OPINIONS BELOW

The relevant opinions of the Middle District of Florida and the Eleventh Circuit are unreported but are included in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The final order sought to be reviewed was entered on February 10, 2005. The order denying rehearing was entered on May 6, 2005. The statutory provision believed to confer on this Court jurisdiction is 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance is conferred by Title 28, Sections 1331, 1343, and 1367.

The material facts begin with the Moore Justice Center (MJC), which houses Eighteenth Judicial District of Florida and Brevard County courts. (R-44-Ex. 1, ¶4.) Courthouse deputies are permanently assigned to particular courthouses and judges in Brevard County, and those judges have input into the deputies' performance evaluations. (R-132-9-10,13,14,23.) The custom of the Sheriff's department is to do the bidding of the judges at or near the courthouses in Brevard County. (R-132-25,26-28; R-47-4-5,10,85-87; R-48-7-8,9-10.) A Sheriff's courthouse commander stated: "When a judge orders a deputy to do something they're pretty well required to do it. They kind of look at us as being guests in their mansion." (R-48-7, 8.) Judges in Brevard County have input into the setting of the Sheriff's procedures regarding court services by deputies, and the Sheriff changes procedure to meet what the judges desire to do. (R-132-39,40.) the Sheriff's admitted policy is for courthouse deputies to

establish a "working relationship" with the judges, for courthouse deputies to provide a function for the judge and the court, and for courthouse deputies to do whatever the judges tell them to do within the scope of the deputies' duties. (R-132-25-29.) The Sheriff's policy is to arrest the subject of every outstanding warrant, even if the arrest occurred in the courthouse; and, the policy is without exception. (R-47-41; R-48-11, 12, 15.)

Specifically regarding the April, 1997, arrest: The sidewalk fronting the entrance to the Moore Justice Center is a public forum where citizens traverse and gather to sell newspapers, converse, post mail in a curbside USPS mailbox, and otherwise exercise First Amendment rights. (R-45-15; R-44-Ex. 1, ¶5.) On April 21, 1997, Petitioner, Glenn William Pinfield, was with several associates standing on the sidewalk fronting the MJC, handing out leaflets critical of the state court judges in Brevard County, singling out by name County Court Judge Adkins and Chief Circuit Court Judge Moxley for specific criticism as being particularly corrupt and/or incompetent. (R-49-4,7; R-44-Ex. 1, ¶8, Ex. 3.) Another leaflet espoused general rights to jury nullification. (R-44-Ex. 1, ¶9, Ex. 3.) Prior to Pinfield's arrest in April, 1997, Sheriff's deputies were aware that judges at the MJC were vexed and troubled by speech espousing jury nullification. (R-45-5, 6.; R-48-6, 7.) Sometime during the same day that Pinfield was leafletting, Chief Judge Moxley entered an Administrative Order requiring prior review of leaflets distributed near courthouses. (R-50-Ex. 1.) After acquiring the leafletters' names and activities, a Sheriff's sergeant "suggested" to Sheriff's Deputy Osborne that Pinfield and his associates were engaged in illegal activity. (R-45-5-6; R-72-8-10.) Osborne first ordered Pinfield and Pinfield's fellow leafletters to stop leafletting altogether, then he ordered Pinfield to step off the sidewalk and immediately into the street if he were to continue leafletting. (R-45-13,

17-18; R-44-Ex. 1, ¶10.) Cars and trucks were not stopped to allow Pinfield onto the street. (R-44-Ex. 1, ¶¶11-12; R-46-15-16; R-44-Ex. 2.)

When Pinfield refused to leaflet in traffic, Osborne arrested Pinfield inches from the street and charged Pinfield with violating Florida Statute § 877.03. (R-44-Ex. 1, ¶14; R-44-Ex. 4; R-45-5-6, 170-18; R-70-Ex. 14, ¶12; R-44-Ex. 1, ¶15.) Specifically, Pinfield was charged with being loud and boisterous and with blocking the ingress and egress of the courthouse. (R-44-Ex. 4, Ex. 5.) Osborne eventually admitted that Pinfield was not blocking the ingress or egress of the courthouse (R-45-10), nor was Pinfield loud or boisterous prior to being arrested. (R-45-10, 18; R-44-Ex. 1, ¶20, ¶¶ 16,17.) Even after Osborne essentially admitted arresting Pinfield without probable cause, the Sheriff admitted that nothing regarding Pinfield's arrest on April 21, 1997, was contrary to the customs or policies of the Sheriff. (R-47-4-5, 11; R-48-9-10.) Osborne was under the customary supervision of the Sheriff's office regarding Pinfield's arrest on April 21, 1997. (R-47-85-87.)

Specifically regarding the September, 1997, arrest and failure to release: Pinfield's case was eventually assigned to Judge Adkins, even though the leaflets specifically maligned Judge Adkins. (R-70-Ex. 14, ¶¶13, 14; R-70-Ex. 19, Ex. 20, 21.) Judge Adkins improperly pressured the prosecutor to oppose Pinfield's motion to disqualify Judge Adkins. (R-56-53,54; R-70-Ex. 15, 8, Ex. 23.) On August 25, 1997, Judge Adkins purportedly entered an order/Notice to Appear for Pinfield and/or his Counsel at a hearing scheduled for September 5, 1997. (R-70-Ex. 22.) Neither Pinfield nor his Counsel were informed of the purported August hearing; and, thus, were not present at that purported hearing. (R-70-Ex. 14, ¶15; Ex. 15, ¶11; Ex. 22.) Also, the purported August hearing was neither logged in nor recorded on the tape recording of that day's proceedings, as was customary.

(R-70-Ex. 42.) Although the purported August hearing supposedly set a hearing for September 5, 1997, neither Pinfield nor his Counsel were notified of the September hearing. (R-70-Ex. 14, ¶15; Ex. 15, ¶11.) When neither Pinfield nor his Counsel appeared at the non-noticed September 5 hearing, Judge Adkins issued a bench warrant for Pinfield's arrest for failing to appear at the September 5 hearing. (R-70-Ex. 24.) When Pinfield's Counsel received the Court Minutes from the September 5 hearing, they filed an Emergency Motion to Dismiss Bench Warrant, setting the hearing on that Emergency Motion for September 22, 1997. (R-70-Ex. 25; R-70-Ex. 14, ¶16; Ex. 15, ¶11; R-70-Ex. 21, Ex. 24, Ex. 26.)

On September 22, 1997, Pinfield was arrested on the bench warrant by Deputy Osborne in the lobby of the MJC on his way to attend the hearing in Judge Adkins' upper floor courtroom in the MJC. (R-70-x. 14, ¶¶17,18.) During the arrest, Osborne and other deputies had actual notice that Pinfield was at the courthouse to appear before Judge Adkins in the hearing that was soon to begin to recall the invalid warrant. (R-70-Ex. 14, 21, 22; R-47-14-18; R56-62,63.) The Sheriff's policy is to arrest the subject of every outstanding warrant, even if the arrest occurred in the courthouse; and, the policy is without exception — necessarily, even for warrants known to be invalid or erroneous. (R-47-41; R-48-11, 12.) The Intentional ambush is evinced by Osborne's unusual stationing in the lobby of the MJC. (R-70-Ex. 14, ¶19.) At any given time, thousands of FTA bench warrants were extant in the Brevard court system. (R-56-56-58.) Ordinarily, Osborne and/or anyone else in the Sheriff's office would not be notified of the outstanding FTA bench warrant against Pinfield. (R-56-61, 62; R-47-82,83.) Osborne did not speak to any person or refer to any document immediately prior to seeing and arresting Pinfield to establish or confirm that a warrant was outstanding against Pinfield. (R-70-Ex. 14, ¶20.)

Pursuant to his FTA arrest, Pinfield was taken from the lobby and held in a cell in the MJC. (R-70-Ex. 14, ¶23.) Immediately after Pinfield's arrest, his Counsel informed Judge Adkins that Pinfield had just been arrested downstairs on the FTA warrant without being allowed to attend the hearing, informed Judge Adkins that Pinfield was still being held downstairs, and asked that Judge Adkins order Pinfield be released to attend the hearing that had been scheduled for that time on that very matter. (R-70-Ex. 15, ¶3.) Judge Adkins smirked and did not appear to be the least bit unhappy that Pinfield was arrested in the courthouse lobby on the way to a scheduled hearing before him on the invalid bench warrant, and he refused to suspend the hearing to call down to order Pinfield released or brought upstairs to the hearing, saying "He's probably already been taken to jail." (R-70-Ex. 15, ¶3.) Judge Adkins also refused to recuse himself from Pinfield's criminal case. (R-70-Ex. 28.) At the end of the hearing, Judge Adkins told Pinfield's attorneys that he had telephonically ordered that Pinfield be released, but that Pinfield had already been transported from the MJC to jail. (R-70-Ex. 15, ¶4.) However, Pinfield was still being held by the deputies at the MJC and had not yet been taken to the Jail. (R-70-Ex. 14, ¶18.)

Specifically regarding the December suppression: On December 10, 1997, while Pinfield was distributing his leaflets on the city sidewalk fronting the Brevard County courthouse in Titusville, a video tape shows that Sheriff's deputy Reynolds took some of the leaflets from Pinfield and showed them to Chief Judge Moxley, whose chambers are in that courthouse. (R-44-Ex. 9.) Chief Judge Moxley, acting in his administrative capacity (R-132-24,25), ordered the deputies to seize Pinfield's materials. (R-44-Ex. 9.) Accordingly, the Sheriff's deputies permanently confiscated the leaflets, and the Sheriff admitted that the deputies' actions pursuant to Chief Judge Moxley's bidding to permanently confiscate the leaflets were within the scope of the deputies'

duties and consistent with the Sheriff's custom. (R-44-Ex. 1, ¶24; Ex. 3; R-132-28,29.) Also pursuant to Chief Judge Moxley's bidding, the deputies ordered Pinfield and his associates, including the videographer, to leave and not to come back; and, if they did not leave or if they came back to the Titusville courthouse, they would be arrested. (R-44-Ex. 1, ¶25; Ex. 9.)

On May 1, 1998, the Fifth DCA reversed Judge Moxley (who had denied Pinfield's appeal of Judge Adkins' refusal to recuse himself) and effectively ordered Judge Moxley to disqualify Judge Adkins. (R-70-Ex. 41.) Eventually, Pinfield's case was reassigned to newly elected County Judge Clarke, to whom Pinfield moved to dismiss the charges because there were no material disputed facts and the undisputed facts did not establish a prima facie case of guilt against him. (R-70-Ex. 44; R-44-Ex. 7; Ex. 1, ¶21.) On October 18, 2000, Pinfield's motion to dismiss was granted. (R-44-Ex. 8; Ex. 1, ¶22.)

REASONS FOR GRANTING THE PETITION

I. THE SHERIFF'S ADMISSIONS AND OTHER EVIDENCE SHOWED THAT THE SHERIFF'S POLICY AND CUSTOM WERE FOR THE DEPUTIES TO ANTICIPATE AND FULFILL THE EXTRA-OFFICIAL WISHES OF THE JUDGES, RESULTING IN THE VIOLATION OF RIGHTS IN THE APRIL, 1997, ARREST.

A violation of Pinfield's First and Fourth Amendment rights occurred when Osborne arrested Pinfield on bogus charges when Pinfield refused to leaflet in a street, inches from an open public area used for public discourse; and, the arrest was pursuant to the Sheriff's "Thomas Becket" policy and/or custom.

A. *Pinfield's rights were violated in the April arrest.*

The evidence shows that Osborne admitted that Pinfield was not blocking the entrance to the MJC and was not engaged in disorderly conduct. Furthermore, the undisputed evidence shows that Pinfield would be permitted to continue leafletting if, and only if, Pinfield stepped off the curb and into vehicular traffic — a patently unreasonable condition under the Fourth Amendment's stricture of reasonableness and clearly suppressive under the First Amendment's strictures to leave free speech unabridged. Also, the undisputed evidence shows that the area in which Pinfield was leafletting was a public forum used by the public to engage in conversation, to post mail, and to display and sell newspapers. In fact, newspaper racks were much nearer to the MJC doors than was Pinfield, and a public USPS blue curbside-style mailbox was in close proximity. Moreover, the newspapers on display at the MJC entrance frequently displayed prominent headlines and articles about judges and trials occurring at the MJC. (R-45-15; R-50-18, 19.) Thus, the evidence shows that the area in which Pinfield was leafletting was a designated or traditional public forum open to public discourse, necessitating a strict scrutiny analysis to determine if the Sheriff could prove a truly compelling reason and had narrowly tailored the restriction on Pinfield's speech. Also, whether a traditional or limited public forum, the arrest of Pinfield is illegal because the evidence shows that the arrest was based on the viewpoint of Pinfield's speech. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that viewpoint discrimination is unconstitutional in a limited public forum).

Finally, the undisputed evidence shows that not even arguable probable cause existed to arrest Pinfield for anything else, such as jury tampering. The intentional targeting of a specific case for a specific jury verdict required by Florida

law regarding jury tampering, as shown in *Nobles v. State*, 769 So. 2d 1063 (Fla. 1st DCA 2000), is readily shown to be inapplicable to Pinfield's leafletting. (R-70-Ex.14, 3,7, 27; R-44-Ex.3; R-50-9.) Thus, the Court of Appeals erred in affirming that the sidewalk was not a public forum and that a jury could not find that Pinfield was unreasonably seized and suppressed because of the viewpoint of his speech.

B. ***The April arrest was pursuant to custom and policy.***

Certiorari should be granted because the Court of Appeals' decision conflicted with this Court's rulings and sanctioned unjust judicial procedures in affirming summary judgment on the basis of insufficient evidence of § 1983 policy and custom, where the Defendant Sheriff's admissions and other substantial evidence showed that the Sheriff's policy and custom were for the Sheriff's courthouse deputies to anticipate and fulfill the wishes — even unconstitutional wishes — of the courthouse judges; i.e., A modern example of the historically familiar Thomas Becket syndrome"; that resulted in unconstitutional seizures of Petitioner and multiple suppressions of Petitioner's speech that the deputies knew to be vexing and troublesome for the judges. "To be sure, 'official policy' often refers to formal rules ***or understandings*** — often but not always committed to writing. . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (emphasis added). Here, Pinfield adduced the admission of the Sheriff's Corporate Representative and of another high-ranking Sheriff's commander in Osborne's chain of command that all of Osborne's actions regarding Pinfield were in compliance with the Sheriff's customs and policies. Commander Donn (the Rule 30(b)(6) Corporate Representative) and Commander Diane Clarke both testified to the effect that Osborne's April arrest of Pinfield appeared to be in compliance with the Sheriff's customs and policies — even after Osborne essentially repudiated any probable cause for the April arrest. Commander Donn also testified to

the effect that Osborne was under proper supervision before, during, and after the arrest. It should be unnecessary that more evidence than the Sheriff's own admissions need be adduced to establish custom or policy to establish the Sheriff's custom and policy, much less create a disputed issue of fact that withstands a Rule 56 motion for summary judgment.

In derogation of Pinfield's Seventh amendment right to a jury trial, the Court of Appeals affirmed on de novo review the District Court's summary judgments against Pinfield, violating this Court's well-established strictures regarding the proper adjudication of Rule 56 motions for summary judgment.[2] Summary judgment is generally an inappropriate way to decide questions of reasonableness because "the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment. . . ." *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 450 n. 12 (1976). *See also Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986) (holding that the moving party bears the burden of proving that no genuine issue of material fact exists); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding that in determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party at the summary judgment stage). As shown throughout this Petition, the Court of Appeals strayed far from the rulings of this Court, resulting in an egregious denial of justice and fairness to Pinfield. Furthermore, the evidence also shows that insofar as the arrest was pursuant to a judge's order or request — which is the proper inference to be made in favor of Pinfield in light of

[2] This Court held that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).

the deputies' foreknowledge of judicial irritation with documents advocating jury nullification, in light of Judge Adkins words and deeds toward Pinfield, and in light of Judge Moxley's promulgation of the administrative order that same day, admissions effectively show that it is customary for Sheriff's deputies to fulfill such judicial desires, orders, and requests. Also, the September, 1997, arrest of Pinfield on Judge Adkins' bogus warrant, Judge Adkins' and Judge Moxley's improper refusals to disqualify Judge Adkins from deciding Pinfield's case, and the December, 1997, confiscation of the leaflets and ejectment of Pinfield from the Titusville Courthouse area pursuant to Judge Moxley's order are all evidence that retroactively support the conclusion that the similar April 21, 1997 arrest of Pinfield was pursuant to the custom and policy of the Sheriff. Moreover, no evidence whatsoever was adduced to show that Osborne's actions against Pinfield were *not* pursuant to the Sheriff's custom or policy, thereby failing to create the genuine dispute of fact required under Rule 56 to counter Pinfield's evidence. Thus, the Court of Appeals decision conflicted with this Court's rulings and sanctioned unjust judicial procedures **in affirming summary judgment against Pinfield and for the Sheriff** regarding the April 1997 arrest.

II. THE SEPTEMBER ARREST IN THE COURTHOUSE ON AN INVALID WARRANT AND CONTINUING DETENTION VIOLATED PETITIONER'S RIGHTS AND WAS PURSUANT TO THE SHERIFF'S CUSTOMS AND/OR POLICIES.

The first subsection below concerns the arrest on an invalid warrant while Pinfield was in the courthouse on his way to the hearing to vacate the warrant, and the second subsection regards the continuation of the seizure after the warrant was vacated.

A. *The September arrest was unconstitutional and pursuant to custom and/or policy.*

Even though a facially valid bench warrant existed to arrest Pinfield in September, 1997, no probable cause existed for the arrest and detention of Pinfield under that warrant or for any other constitutionally cognizable reason. The law is clear that a facially valid but erroneously issued warrant cannot provide probable cause for an arrest. *See Whiteley v. Warden*, 401 U.S. 560, 568 (1971). Furthermore, an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances, including other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight. *Berg v. County of Allegheny*, 219 F.3d 261, 273 (3d Cir. 2000) (reversing summary judgment because questions were raised that the seizure was not objectively reasonable because, *inter alia*, the person subject to the facially valid warrant did not attempt to flee, because of the nonviolent nature of the crime, and because the arresting officer was predisposed to make the arrest). Here, Pinfield adduces evidence that the bench warrant was invalid and erroneous because it was predicated upon the concocted and false premise that Pinfield and/or his Counsel had been notified of a court appearance that they were required to attend. Moreover, an arrest under such a warrant without probable cause is pursuant to the Sheriff's custom and policy; i.e., to arrest the subject of every outstanding warrant, even if the arrest occurred in the courthouse; and, the policy is without exception, even if the warrant is invalid or erroneous.

Evidence also exists that Osborne was predisposed to arrest Pinfield, to rid Judge Adkins of a turbulent detractor, and knew that the warrant was invalid. The evidence shows that Osborne was lying in wait for Pinfield to arrive for the hearing to vacate the warrant — a fact of which Osborne

would not ordinarily be aware unless he was predisposed to arrest Pinfield. As the Sheriff essentially admits, Osborne would have had to actively seek out the date and time of the hearing to know when Pinfield would be present so that he, Osborne, could be present to arrest Pinfield when Pinfield appeared for the hearing. Also, the arrest on that bench warrant should not have occurred because of the absence of other exigent criteria: Pinfield was not violent, the FTA charge did not involve violence or danger, and Pinfield was not about to flee (he entered the MJC of his own volition to attend a hearing to have the FTA bench warrant vacated) — all of which Osborne had actual knowledge. Although the general rule is that an arresting officer with a valid warrant need not investigate every protestation of innocence or possibly exculpatory fact, the evidence shows the exception to that rule in this case because Osborne had reasonable and ready access to information that he was told (and probably already knew) would show that probable cause did not exist to arrest Pinfield. The undisputed evidence shows that Osborne knew that the FTA bench warrant was outstanding on Pinfield and, as stated above, Osborne knew that Pinfield would be arriving at the MJC to attend the hearing set to dismiss that charge. Moreover the evidence is undisputed that Pinfield actually informed Osborne that he was on his way to appear before Judge Adkins on that charge, that his attorneys were waiting for him in the courtroom, and that the hearing was about to begin. Osborne's September arrest of Pinfield actually frustrated the hearing convened by the Court regarding the FTA charge, and vexatiously and unnecessarily multiplied the cost and time needed to sort out the FTA charge and subsequent mess created by the September arrest. For a person to be arrested and jailed on a FTA bench warrant at the MJC on his way to appear in that courthouse for a hearing to dismiss that bench warrant before the judge who issued the FTA bench warrant is so Kafkaesque and unreasonable as to deny substantive due process and demean and undermine the system of justice in this nation.

Even if Osborne suspected that Pinfield would not appear or if the hearing were not about to begin, the clearly reasonable thing to do was to escort Pinfield up to Judge Adkins' courtroom, to ascertain the truth of the circumstances, and to remand Pinfield into the custody of Judge Adkins' courtroom deputy. Thus, the circumstances; e.g., evidence of Osborne's predisposition, the irregularities surrounding the issuance of the bench warrant; the need not to derail the imminent hearing on the warrant by arresting and jailing Pinfield, especially when the validation determination of the hearing was so conveniently at hand; the ease for Osborne to accompany Pinfield to the courtroom and remand him to the custody of the deputy stationed in Judge Adkins' courtroom; would allow a reasonable jury to conclude that the September seizure and arrest of Pinfield was an unconstitutionally unreasonable contrivance to "rid" Judge Adkins of Pinfield on an invalid warrant, in full compliance with the Sheriff's policies and/or customs.

B. ***Continuing seizure was unconstitutional and pursuant to custom and/or policy.***

The evidence shows that Pinfield was still being held in detention at the MJC after Judge Adkins ostensibly withdrew the warrant and ordered Pinfield to be released from custody, and even though Judge Adkins supposedly was told that Pinfield had already been transported to jail. "[A] plaintiff may state a constitutional claim if, after the police officers make an arrest pursuant to a warrant, the police officers fail to release the arrestee after they receive information upon which to conclude beyond a reasonable doubt that such warrant had been withdrawn." *Duckett v. City of Cedar Park*, 950 F.2d 272, 279 (5th Cir. 1992); *see also Babers v. City of Tallassee, Ala.*, 152 F. Supp. 2d 1298, 1309 (M.D. Ala. 2001) (holding that following a lawful warrantless arrest, a police officer has an affirmative duty to release an arrestee if he ascertains beyond a reasonable doubt that the probable cause

that formed the basis for the arrest was unfounded). Here, as soon as Judge Adkins called to order that Pinfield be released, any probable cause to further hold Pinfield evaporated, even if the warrant had been valid. However, the Thomas Becket syndrome that comprised the Sheriff's custom and policy mandated that the deputies continue to do what Judge Adkins truly desired, which obviously was to trample Pinfield's rights whenever possible. Thus, the evidence shows that the Sheriff had no probable cause to continue to detain Pinfield in September, 1997, but did so according to custom and policy.

III. THE SUPPRESSION OF PETITIONER'S SPEECH IN DECEMBER, 1997, WAS PURSUANT TO THE SHERIFF'S CUSTOM AND POLICY, AND THE JUDGE WHO ORDERED THE SUPPRESSION WAS A FINAL POLICYMAKER FOR THE SHERIFF.

Certiorari should be granted regarding this issue because the Court of Appeals' decision conflicted with this Court's rulings and sanctioned unjust judicial procedures in affirming summary judgment against Petitioner, where substantial evidence shows an unconstitutional suppression of Petitioner's speech; and, that the suppression was pursuant to the Sheriff's "Thomas Becket" custom, and/or pursuant to Judge Moxley's EXPRESS order, where Judge Moxley was a final policymaker for the Sheriff.

Regarding the December, 1997, Titusville incident, the District Court originally granted summary judgment in favor of Pinfield, holding that the Sheriff's deputies violated Pinfield's constitutional free speech rights and that the deputies were acting pursuant to the policy or custom of the Sheriff when those deputies complied with the direct orders of Chief Administrative Judge Moxley. Then, the District Court reversed itself, and the Court of Appeals affirmed the District Court's self-reversal.

A. *The December suppression was pursuant to the Sheriff's "Thomas Becket" policy and/or custom.*

The confiscation of Pinfield's leaflets was impermissibly specific as to viewpoint and constituted prior restraint without a compelling state interest. Furthermore, the open-ended banishment of Pinfield from the courthouse and nearby City of Titusville environs was a drastic suppression without justification. *See United States v. Grace,* 461 U.S. 171, 177 (1983) (striking a federal law prohibiting free expression on the public sidewalks around the Supreme Court building, holding that the government's right to restrict expression in such places is "very limited"). As to custom and/or policy, the evidence shows that the leaflets being confiscated and Pinfield being ordered by Reynolds to leave the courthouse, the public city sidewalk, and the entire area *adjacent to* the Courthouse, and not to return under pain of arrest, is and was entirely consistent with following the Sheriff's policy and custom for Sheriff's deputies to rid the judges of turbulent people who irritate the judges.

B. *Judge Moxley was a final policymaker for the Sheriff.*

Judge Moxley was a final policymaker for the Sheriff with respect to the December incident on two bases: first, because state law gave the Judge authority to set policy regarding law enforcement in and around the courthouse; and second, because the Sheriff delegated the relevant final policymaking to the Chief Judge. Besides the Thomas Becket custom/policy, Judge Moxley was authorized under state law regarding some relevant control over courthouse deputies, even though Judge Moxley exceeded that authority. The determination of whether or not an individual is a final policymaker is based on a functional test. *Owens v. Fulton County*, 877 F.2d 947, 950 (11th Cir. 1989). In other words, the function of the individual making the decision is more

important than that individual's title or than which governmental entity signs that decisionmaker's paychecks. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997). For any individual case, the determination of whether an individual was acting as a final policymaker is also made based on state law. *Id.* Under Florida law, chief administrative judges are given final policymaking authority for activities in the courthouses in their circuits. Fla. Stat. § 43.26. In this case, the Sheriff of Brevard County assigned specific deputies to work at the various courthouses in Brevard County. Pursuant to state law giving Chief Administrative Judge Moxley policymaking authority for law enforcement at the courthouses, the Sheriff's deputies who were assigned to the Titusville courthouse asked Judge Moxley what they should do about Pinfield, and, under color of that state law, the Sheriff's deputies complied with Judge Moxley's order to confiscate Pinfield's effects and chase Pinfield away from the public property adjacent to the courthouse under threat of arrest — even though Judge Moxley's authority under state law did not extend to the public city sidewalk where Pinfield was leafletting. Fla. Stat. § 43.26. *See, also Grace,* 461 U.S. at 177. Also, when Judge Moxley instructed the Sheriff's Deputies to confiscate Pinfield's literature and to chase Pinfield away, Judge Moxley was acting in his capacity as Chief Administrative Judge for *only* the Brevard County portion of the Eighteenth Judicial Circuit of Florida.[3] Thus, the Sheriff's deputies were acting under color of the decision of a final policymaker under Florida law when they suppressed Pinfield's speech in December, 1997.

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[3] Although the Eighteenth Judicial District consists of both Brevard and Seminole counties, the administrative order at issue — by its own terms — covers only Brevard County. Thus, even if Judge Moxley's duties as Chief Administrative Judge might be performed as a state official, he was acting in this case as a final policymaker for the Brevard County Sheriff only.

This case is factually and legally indistinguishable from *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur*, sheriff's deputies attempted to enforce a capias at Pembaur's office. The deputies contacted their supervisor, who instructed them to follow the sheriff's procedures and contact the county prosecutor and follow the orders of the prosecutor regarding the capias. The officers followed the unconstitutional procedure ordered by the prosecutor. The trial court dismissed Pembaur's claim under § 1983 on the basis that the county prosecutor was not a final policymaker for the sheriff. However, the Supreme Court held that the trial court erred because the prosecutor had been a final policymaker for the sheriff under the circumstances. This Court's decision was based, in part, on the fact that Ohio state law

> provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's Office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case.

Pembaur, 475 U.S. at 485.

Here, similarly, state law gives the Chief Administrative Judge authority for law enforcement at courthouses in the Judge's circuit, and the deputy's sought a decision from Judge Moxley regarding what to do about Pinfield's distribution of literature. Judge Moxley gave an order, which Reynolds followed, which led to the violation of Pinfield's constitutional rights. Thus, this case is indistinguishable from *Pembaur*, in which the Court found that state law created a

situation in which the sheriff and the county prosecutor both had final policymaking authority over the sheriff's deputies pursuant to state law.

According to the District Court's (affirmed) Order, it is the absence of any authority of the Sheriff over Judge Moxley that differentiates this case from *Pembaur*. However, in *Pembaur*, the sheriff also had no authority over the prosecutor who instructed the deputies to violate Dr. Pembaur's constitutional rights; thus, there is no distinction between this case and *Pembaur*. The question of who has control over the policymaker is relevant only to the question of which entity is liable behind the ordinary and nominal policymaker for the agency whose employees violated the rights at issue — in other words, who controlled the sheriff, the county or the state? It is undisputed and long established that sheriffs in Florida are not state agents, but constitutional officers with local autonomy over law enforcement activity that subjects the sheriffs to liability under Section 1983. In an inquiry of whether a local officeholder like a Florida sheriff is a final policymaker, it is not the question of who controls the immediate policymaker; i.e., Judge Moxley; that is relevant, but over which local governmental entity, ordinarily subject to § 1983 liability for constitutional violations, that the immediate policymaker has some specific or limited degree of control. Just as the state attorney in *Pembaur* could not be controlled by the Sheriff, but could control the sheriff's deputies in certain circumstances, so Judge Moxley could not be controlled by the Brevard Sheriff, but Judge Moxley could control the Sheriff's deputies when sought out by the deputies for direction, such as the circumstances at bar, in interpreting and implementing the administrative orders at the courthouses.

The legal issue in this case is distinct from the legal issue in *McMillian*, where the question was who is responsible for the sheriff's actions, the county or the state.

See 520 U.S. at 783. That is a separate question from who has policymaking authority for the sheriff other than the sheriff himself, which is the question here and in *Pembaur*. In McMillian, section 1983 did not apply to that sheriff because Alabama sheriffs are arms of the state, unlike sheriffs in Florida. Thus, the analysis of *Pembaur* controls in this case.[4]

In addition, the Sheriff delegated more policymaking authority to the Chief Judge than required by state law.

> Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances.

Pembaur, 475 U.S. at 483. Here, the Sheriff delegated virtually unlimited — including extra-legal — power to the Chief Judge to create and implement policies and/or customs for Sheriff's deputies assigned to courthouse duty. Moreover, the evidence shows that the Sheriff voluntarily retained no policymaking authority over the administration of the courthouses, and retained no authority to review Judge Moxley's administrative orders and Judge Moxley's

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[4] The other cases cited by the District Court regarding the analysis of state versus county officials are likewise red herrings to the real issue here, which is who can make final policy for the Brevard County Sheriff.

instructions to Reynolds regarding enforcing those orders. In fact, the deputies in this case did not call some superior officer in the Sheriff's department; rather they went straight to the delegated policymaker, Judge Moxley. Evidence that the Sheriff relied on the Chief Administrative Judge as a policymaker for law enforcement in courthouses in Brevard County is even more compelling where the Chief Administrative Judge played an invited role in creating the policies for courthouse deputies. The Sheriff gave the Chief Judge input to the relevant policies, and expressly gave all judges direct and considerable authority regarding many aspects of the activities of courthouse deputies.

The District Court made much of the premise that the Sheriff had a statutory duty to obey the orders of Judge Moxley, and, therefore, that the Sheriff could not be held liable for the Sheriff's deputies' enforcement of those orders. The District Court stated: "this Court can discern no basis for concluding that Florida law intended the Sheriff of Brevard County to be liable for the policies devised and implemented by a member of the judicial branch over whom the Sheriff had not one iota of control and had a statutory obligation to obey." The problem with this analysis is that the Sheriff did not have a statutory obligation to obey unlawful orders by the Chief Administrative Judge. The Brevard County Sheriff, as an elected "constitutional officer" under Florida law, maintains independent control over courthouse deputies to preclude them from carrying out illegal judicial orders, and has an overriding duty to uphold individual rights guaranteed by the Florida and U.S. constitutions. *See, e.g., Morse v. Moxley*, 691 So 2d. 504, (Fla. 5th DCA 1997) (quashing a Moxley administrative order because it intruded upon the authority the law invests in an analogous constitutional officer). *See also Pembaur*, 475 U.S. at 485 (finding that entities like the Sheriff often create policies and customs like those at issue and delegate policymaking authority, while remaining subject to 1983

liability). For example, if Judge Moxley had ordered Reynolds to go out and shoot Pinfield, clearly another unlawful order, Reynolds would have been under no statutory obligation to obey that order. *See Town of Castle Rock, Colorado, v. Gonzales*, 125 S. Ct. 2796, 2806 (2005) (citing *Chicago v. Morales,* 527 U.S. 41 (1999), to show traditional discretion in making arrests coexists with or supersedes mandatory enforcement laws). However, none of the corporate representatives for the Sheriff testified that Sheriff's deputies were instructed to obey only lawful orders of the Chief Administrative Judge, or even to seek guidance from a supervisor when the judge's orders seemed questionable or at any other time. Rather, they all testified that deputies were required by the Sheriff to basically do whatever the judge wanted them to do, and the fact is that Reynolds did not even bother to ask a supervisor what he should do about Pinfield's leafletting; instead, he went straight to Judge Moxley. Moreover, the deputies' good faith in attempting to comply with Judge Moxley's orders is not a defense to the Sheriff's liability. *See Berdin v. Duggan*, 701 F.2d 909, 913 (11th Cir. 1983) (The municipality may not assert the good faith of its agents as a defense to the liability. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980)). Thus, because the deputies in this case were acting pursuant to the orders and wishes of the Chief Administrative Judge, consistent with the Sheriff's "Thomas Becket" policy and custom; because Florida law provides the Chief Administrative Judge with policymaking authority for law enforcement activities at the courthouses within the judge's circuit; and, because in this case, the Sheriff actively invited and delegated policymaking authority over the deputies assigned to work at the courthouse to the Chief Administrative Judge, the Sheriff is liable for his deputies' actions against Pinfield at the Titusville Courthouse on December 10, 1997.

IV. THE DENIAL OF PETITIONER'S MOTION TO AMEND OUT OF TIME TO CLAIM COMMON LAW FALSE ARREST IS AN ABUSE OF DISCRETION.

Certiorari should be granted regarding this issue because the Court of Appeals' decision sanctioned unjust judicial procedures in affirming the denial of Petitioner's motion to amend out of time to claim common law false arrest, where Petitioner was precluded by state law from filing the claim prior to the amendment deadline in the scheduling order; where all of the elements of the claim, such as lack of probable cause, were fully litigated throughout the action as elements of the federal claims of free speech and unreasonable seizure violations, the false arrest claim essentially being a lesser included offense of the federal claims; and, where the Court provided a legally insufficient basis for the denial of the motion to amend.

Pinfield's false arrest claims were not made in the initial Complaint because Pinfield was required by Florida Statute § 768.28(6) to provide the Sheriff with six months notice before filing state law claims, and the Complaint was filed at about the same time as the filing of that notice. Thereafter, the District Court issued the case scheduling Order that set the deadline for amendments for a date prior to the running of the six months required by Florida law. Thus, Pinfield was legally precluded from amending his Complaint before the deadline passed.

However, because the Parties had been litigating the elements of state law false arrest claims throughout this lawsuit, because no prejudice whatsoever would have accrued to the Sheriff by allowing the amendment, and because no delay or other burden would have been added to the Court's labor, Pinfield should have been allowed to amend his Complaint to formally add a false arrest claim for both of

the arrests at issue in this lawsuit. Fourth Amendment unreasonable seizure and common law false arrest claims share the need to prove lack of probable cause, the only difference being the burden of proving probable cause shifts to the defendant under common law. *See Penn v. City of Miami*, 1999 WL 1050059, *6-*7 (S.D. Fla. Sept. 7, 1999) (analyzing shared elements of constitutional and common law claims of false arrest). Moreover, the probable cause "proof" and arguments that the Sheriff made throughout its Motion for Summary Judgment are the identical proof and arguments the Sheriff would have to make as its affirmative defenses to the false arrest claims. Also, Pinfield's requisite notice to the Sheriff under Florida Statute 768.28(6) provided the Sheriff with notice that Pinfield always intended to file state law claims. Thus, the elements of the false arrest claim had already been pled and had been litigated from the initiation of this action, and the Sheriff would have been neither surprised nor otherwise prejudiced in any way by the amendment.[5]

Additionally, the Federal Rules of Civil Procedure contemplate analogous amendments being made as late as during or after trial in the case. *See* Fed. R. Civ. P 15(b). Here, again, the Sheriff would not have been surprised or otherwise prejudiced because the elements for the false arrest claims were raised and litigated throughout this case as part of the litigation of the elements of Pinfield's federal claims. In fact, the lack of probable cause is at the heart of all of Pinfield's claims. As such, the pleadings would have been subject to amendment to conform to the evidence even as late as the end of the trial.

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[5] Long after the Magistrate Judge denied Plaintiff's Motion To Amend, the District Court allowed additional time to the Sheriff for discovery on other issues.

Furthermore, the Magistrate Judge abused its discretion and erred as a matter of law in denying the Motion because the Magistrate Judge's Order does not state the specifically requisite legal or factual grounds for the denial of the Motion.[6] For the past half century and more, federal courts consistently have held that motions to amend, even if more than a year late, must be granted unless a specific showing is made of delay or undue prejudice to the defendant. *See, e.g., New York State Ass'n of Career Schools, Inc. v. State Educ. Dept. of State of N.Y.*, 142 F.R.D. 403 (S.D. N.Y. 1992); *Donovan v. Gillmor*, 535 F. Supp. 154 (N.D. Ohio 1982); *Smith v. Guaranty Service Corp.*, 51 F.R.D. 289 (N.D. Cal. 1970); *Carroll v. Pittsburgh Steel Co.*, 103 F. Supp. 788 (W.D. Pa. 1952); *Armstrong Cork Co. v. Patterson, Sargent Co.*, 10 F.R.D. 534 (D. Ohio 1950). Here, the Order could not and did not provide findings of why the denial was necessary, especially in light of the lack of prejudice to the Sheriff, the extreme prejudice to Pinfield, the statutory preclusion to deadline adherence, and the absence of delay or burden on the Court's business. In essence, the Magistrate Judge's denial of Pinfield's Motion to Amend is an abuse of discretion in elevating form over substance, and the substance was not addressed in the Magistrate Judge's denial.

Nevertheless, Pinfield's Motion to Amend *is*, effectively, a motion to extend the deadline. Also, the failure to amend sooner is attributable to disarray in the small law firm of Pinfield's Counsel, due to sudden and severe illnesses and injury of key staff members, particularly due to a severe injury to the scheduling assistant that has resulted in permanent disability for her. However, the most pertinent reasons for

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[6] The Order does state that "Plaintiff did not file a motion to extend that date [regarding the deadline to file amendments]" and that "Plaintiff does not give any explanation as to why he did not file his motion to amend his complaint in order to add a state law claim until almost one year following the expiration of the waiting period."

why the Complaint was not amended sooner are that discovery and litigation already had heavily emphasized the probable cause element of Pinfield's federal claims that is common to the false arrest claims, that the Sheriff would not be prejudiced in any way by Plaintiff making the amendment when the Motion was actually made, and that the case would not be delayed in any way by the amendment. Besides, Pinfield had not requested any other extension whatsoever, and had not abused any of the local or Federal Rules of Civil Procedure. Moreover, even if the amendment had caused some sort of problem for the Court's business, the District Court simply could have declined to exercise supplemental jurisdiction over the state law claims, allowing Pinfield to file those claims in state court. Thus, the Magistrate Judge's denial is an abuse of discretion, unjustly and unfairly placing form over substance, thereby running counter to the letter and spirit of Federal Rules of Civil Procedure 1, 6, 15, and 72. Therefore, for all of the foregoing reasons, Pinfield should have been allowed to amend his Complaint.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari to fully consider this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 10, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-11498

D. C. Docket No. 00-01601-CV-ORL-19-C

GLENN WILLIAM PINFIELD,

Plaintiff-Appellant,

versus

PHIL WILLIAMS, Brevard County Sheriff,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(February 10, 2005)

Before BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.

PER CURIAM:

Glen William Pinfield appeals an adverse summary judgment and the denial of his motion to amend the complaint

* Honorable Richard Fred Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation.

in this 42 U.S.C. § 1983 action against Brevard County Sheriff Phil Williams, sued in his official capacity, for alleged violations of Pinfield's First and Fourth Amendment rights. The district court granted summary judgment to Sheriff Williams on all counts, having concluded that there was no disputed question of material fact regarding whether the alleged constitutional violations were part of a "policy" or "custom" of the Brevard County Sheriff's Department.[1] Prior to the summary judgment rulings, the magistrate judge denied Pinfield's motion to amend the complaint to add state law claims.

We review the grant of summary judgment *de novo*. *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003). In conducting our review, we apply the same legal standards as the district court. *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003). Thus, we view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. *Id.* Summary judgment is not appropriate unless the evidence demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as matter of law." Fed. R. Civ.P. 56(c). In addition, we apply an abuse of discretion standard to our review of the denial of a motion for leave to amend the complaint. *Walker v. Southern Co. Services, Inc.*, 279 F.3d 1289, 1291 (11th Cir. 2002).

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1. The district court also granted summary judgment in favor of the defendant on Pinfield's claims for violations of his Fourteenth Amendment Equal Protection rights and for civil conspiracy. Pinfield does not appeal the district court's decision as to these counts.

Appendix A

Having reviewed this record and considered the briefs and oral argument of the parties, we are satisfied that the district court did not err in concluding that this record cannot support the necessary conclusion that any of the acts complained of here were the result of an official policy or custom of the Brevard County Sheriff, the only defendant named in this case. We also conclude that it was not an abuse of discretion for the magistrate judge to deny Pinfield's motion to amend the complaint or the district court judge to fail to modify or set aside the magistrate judge's order.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED MARCH 8, 2004

Case No. 6:00-cv-1601-Orl. 19JGG

GLENN WILLIAM PINFIELD,

Plaintiff,

-vs-

PHIL WILLIAMS, Brevard County Sheriff,

Defendant.

ORDER

This case comes before the Court on the following:

1. Sheriff Williams' Motion for Summary Judgment (Doc. No. 129); Plaintiff's Memorandum of Law Opposing Defendant's (Second Motion for Summary Judgment (Doc. No. 135).

2. Plaintiff's Second Motion for Partial Summary Judgment and Incorporated Memorandum of Law (Doc. No. 133); Sheriff Williams' Response to Plaintiff's Second Motion for Partial Summary Judgment (Doc. No. 136).

Appendix B

Procedural History

Plaintiff brought suit against Defendant for a series of arrests and altercations between Plaintiff and Defendant's agents in April and September, 1997. *See* Doc. No. 1. Plaintiff alleged that the Sheriff violated his constitutional and statutory rights when Plaintiff tried to engage in acts of protected speech, consisting mainly of distributing literature on jury nullification.

Following discovery, Plaintiff brought a motion for partial summary judgment, contending that he was entitled to judgment as a matter of law on all counts and the only issue for trial was the question of damages. Doc. No. 41. Shortly thereafter, Defendant filed his own motion for summary judgment, arguing that there was no dispute as to any material fact and the evidence was insufficient to warrant bringing Plaintiff's claims before a jury. Doc. No. 51. The Court held a hearing on these motions on October 3, 2002. Doc. No. 99.

The Court granted summary judgment for Defendant on the two arrests in April and September, 1997 which formed the principle basis for this lawsuit, but granted partial summary judgment to Plaintiff with respect to an incident that occurred at the Titusville Courthouse on December 10, 1997. Doc. No. 109. The Court concluded that even though the Titusville incident was not part of the complaint, the parties implicitly agreed to its litigation. Doc. No. 105, p. 2. The Court further concluded that the confiscation of Plaintiff's materials and his banishment from the vicinity of the courthouse was unconstitutional. Doc. No. 109, pp. 18-29. Finally, the Court ruled that the Sheriff is liable for these violations because his deputy, Craig Reynolds, was acting under the direction of Judge Moxley, the Chief Judge on

the 18th Judicial Circuit, who, for the purposes of the Titusville Courthouse incident, was a final policymaker for the Brevard County Sheriff's department. *Id.* at p. 17. The only issue for trial was the extent of Plaintiff's damages as a result of the Titusville incident. *Id.*, at p. 33.

Defendant then filed a motion for reconsideration urging the Court to reexamine its decision on the ground that Defendant lacked notice that he was expected to defend himself concerning the Titusville incident and, furthermore, that Judge Moxley was not a final policymaker for the Brevard County Sheriff. Doc. 111. In response, Plaintiff filed a motion to amend his complaint to conform to the evidence. Doc. No. 117. The Court denied Plaintiff's motion to amend, but granted the motion for reconsideration to the extent that the Court recognized Defendant's legitimate concern that it had insufficient notice that the Titusville incident would become one of the bases of Plaintiff's claims. Doc. No. 125, p. 2. The Court directed the parties to confer and propose a schedule of discovery that would enable them to ascertain whether Judge Moxley was a final policymaker. *Id.* In response, the parties proposed a 120-day discovery period to explore the question of Judge Moxley's status. Doc. No. 126. The Court adopted this recommendation and discovery recommended. Doc. No. 128.

Following this second phase of discovery, Defendant filed his current motion for summary judgment. Doc. No. 129. In it, Defendant argues that (1) the incident at the Titusville Courthouse did not rise to the level of a constitutional violation, and (2) Judge Moxley cannot be deemed a final policymaker for the Brevard County Sheriff's department. *Id.* at p. 2. For his part, Plaintiff also filed a motion for summary judgment, arguing that Judge

Appendix B

Moxley was indeed a final policymaker for the Brevard County Sheriff's department. Doc. No. 133.

The Facts:

The Titusville Courthouse Incident

On April 21, 1997, Judge John Moxley, the Chief Judge of the 18th Judicial Circuit, issued an administrative order that required people who want to distribute material on courthouse property within the 18th Judicial Circuit to furnish copies to the Chief Judge in advance so "that the issues of the right to free speech, due process, and the right to a fair trial under the law may be adjudicated." Doc. No. 50, Exh. 1. Judge Moxley testified that the purpose of the order was to ensure that judges would be in a position to take precautionary or curative measures with their jurors in the event that they are exposed to the sort of jury nullification literature distributed by Plaintiff and like-minded citizens, which Judge Moxley believed exerts a pernicious influence on jurors. Doc. No. 50, Moxley Depo., pp. 10 & 27. The order does not by its terms ban any particular point-of-view nor does it call for the wholesale confiscation of material that is in the midst of being distributed without having first been subject to the review process. The order also does not specify exactly what this review process entails, how long it takes, and how far in advance activists need to submit their literature.

The Titusville incident began with Plaintiff again distributing jury nullification leaflets and other material such as the United States Constitution at the Titusville Courthouse on December 10, 1997. According to Plaintiff's videotape of the incident, Plaintiff and two friends stood on the sidewalk in front of the

courthouse and handed their literature to any passerby who cared to receive it.[1] Doc. 44, videotape exhibit.

The Titusville Courthouse directly abuts a public sidewalk and ordinary city street. There is a small walkway, with a flagpole as its centerpiece, that leads from the public sidewalk to the courthouse doors. Only this walkway appears to be on courthouse property. According to the videotape, the Plaintiff remained on the public sidewalk in front of the courthouse while handing out his jury nullification literature, and the only time his friend Mr. Reid was on courthouse property was when he was speaking with Deputy Reynolds or a man who stood on the steps to smoke.[2]

The videotape begins with Deputy Eberhart asking Plaintiff and his friends what they were distributing and what it means. After reviewing the material, Deputy Eberhart went into the courthouse. Deputy Craig Reynolds came outside thereafter and told Plaintiff that he could not give his literature to jurors. Plaintiff insisted that he had a constitutional right to hand out his leaflets to anyone and continued to do so even as Deputy Reynolds carefully read some of the literature. Deputy Reynolds testified that he was trying to ascertain if the Plaintiff had permission to

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1. The friends were Larry Reid, who appears in the videotape, and Kevin Phillips, who shot the video. Doc. No. 131, Pinfield Depo. p. 12. Neither were deposed.

2. The videotape depicts a man smoking on the steps of the courthouse who may have taken a copy of Mr. Reid's jury nullification material while both men were on the courthouse property. The majority of the leafleting, however, appears to have taken place on the public sidewalk.

distribute literature in front of the courthouse.[3] Doc. 76, Reynolds Depo. p. 5. This encounter was reasonably congenial, and Deputy Reynolds asked Plaintiff to remain on the public sidewalk while he went inside to speak with Judge Moxley.

Deputy Reynolds returned with a substantially different attitude. He informed Plaintiff that his literature was subject to seizure and that Plaintiff and his associates would be arrested if they remained. Deputy Reynolds thereupon confiscated Plaintiff's leaflets and other things, apparently including a number of personal items that had nothing to do with jury nullification advocacy, and chased Plaintiff and his friends away. Deputy Reynolds and two fellow officers followed Plaintiff and his friends into the parking lot across the public street from the courthouse to ensure that they vacated not only the immediate environs of the courthouse but the neighborhood altogether.

The videotape evidence establishes that Deputy Reynolds seized Plaintiff's materials and escorted him away from the vicinity of the Titusville Courthouse. Though Deputy Reynolds did not remember speaking to Judge Moxley when he was deposed, he

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3. It is not clear if Deputy Reynolds' use of the word "permission" to leaflet refers to Judge Moxley's April 21, 1997 order or whether Deputy Reynold's simply meant that he assumes people who want to demonstrate need permission and he was trying to find out if Plaintiff had such permission. Deputy Reynolds testified that his interpretation of the videotape was that he went in to speak to Judge Moxley only after determining that Plaintiff did not have permission to leaflet. Doc. No. 76, Reynolds Depo. p. 5. He also testified that he did not think that he was even aware of the April 21, 1997 order until he went in to speak with Judge Moxley. *Id.* at p. 6.

did not express any doubt in his deposition testimony that he had in fact spoken with Judge Moxley after watching himself say on the videotape that he had done so. Doc. No. 76, Reynolds Depo. p. 6. Judge Moxley only had a vague recollection of a conversation with Deputy Reynolds, but not its details. Doc. No. 50, Moxley Depo. p. 26. Therefore, while it is reasonable to infer that (1) Deputy Reynolds spoke with Judge Moxley before seizing Plaintiff's materials and escorting him away, and (2) Deputy Reynolds believed he was acting with the authority of the Chief Judge, there is no clear evidence concerning what Judge Moxley in fact told Deputy Reynolds to do.

For the purposes of Defendant's motion for summary judgment, however, the Court must construe all ambiguities in favor of Plaintiff. Accordingly, the Court will assume that Deputy Reynolds was acting at all times pursuant to Judge Moxley's specific instructions to enforce the April 21, 1997 administrative order by confiscating Plaintiff's material and escorting him from the vicinity of the courthouse.

Legal Analysis

In its first summary judgment Order, the Court concluded, *inter alia*, that Judge Moxley acted in an administrative, rather than judicial, capacity when he directed a Brevard County Sheriff's deputy to confiscate Plaintiff's literature and escort him from the premises. Doc. No. 109. On the strength of this conclusion, the Court reasoned that Judge Moxley became a *de facto* final policymaker for the Brevard County Sheriff's Office. While there is no question that Judge Moxley was an

administrative policymaker, the Court has reconsidered its ruling that Judge Moxley was a final policymaker for the Brevard County Sheriff's Office.[4]

1. Defendant's Motion for Summary Judgment (Doc. No. 129)

a. The Law of 42 U.S.C. Section 1983

42 U.S.C. section 1983 creates a federal cause of action for constitutional torts. In an effort to strike a workable balance between the preservation of individual rights and the ability of governmental entities to do their vital work under often difficult circumstances, the Supreme Court has developed a jurisprudence of section 1983 liability that is much more demanding than the lenient *respondeat superior* approach in the ordinary tort context. Liability will attach to a governmental entity only when it can be said that the constitutional tortfeasor was acting pursuant to an official policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-480 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Marsh v. Butler County*, 268 F.3d 1014, 1027 (11th Cir. 2001).

The threshold question in this case is whether Judge Moxley acted as a final policymaker for the Brevard County Sheriff's

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4. It is unnecessary to revisit the constitutionality of confiscating Plaintiff's materials and evicting him from the sidewalk in front of the courthouse because the analysis of Judge Moxley's status as a final policymaker renders the constitutional question moot.

department when he wrote the April 21, 1997 administrative order and directed Deputy Reynolds' actions on December 10, 1997 at the Titusville Courthouse. Doc. No. 109, pp. 8-9. In other words, the Brevard County Sheriff will only be liable if Judge Moxley and his *de facto* subordinate that day, Deputy Reynolds, acted in a county capacity in the furtherance of official county policy. The issue of Judge Moxley's status as a final policymaker is determined with reference to state law. *Pembaur*, 475 U.S. at 483; *McMillian v. Monroe County*, 520 U.S. 781, 784 (1997).

However, "McMillian . . . teaches that state law cannot answer the § 1983 policymaker question simply by 'labeling' an official as a county or state official. Instead, courts must focus on control over the official." *Grech v. Clayton County*, 335 F.3d 1326, 1330 (11th Cir. 2003). In *Turquitt v. Jefferson County*, 137 F.3d 1285, 1292 (11th Cir. 1998), an *en banc* panel of the Eleventh Circuit underscored the significance of "control" in emphasizing that section 1983 inquiry asks "which government body, under state law, had direct control over how the sheriff fulfilled [the duty at issue]." In *Turquitt*, the defendant Jefferson County was found not to be liable under section 1983 for the acts of its sheriff because under state law the sheriff was not the subordinate of the county, but instead an independent state law enforcement official. *Id.* Facing a similar question, the *Grech* court reiterated that a "Sheriff's policy or act cannot be said to speak for the county if the county has no say in what policy or action the Sheriff takes." 335 F.3d at 1331. Reasoning by analogy, *McMillian* and its progeny stand for the proposition that the Brevard County Sheriff's department will be liable for the policies of Judge Moxley only if Judge Moxley and Deputy Reynolds were acting as Sheriff's department officials and the

Sheriff could have exercised control over them. *Id.* at 1331-1332 ("the appropriate § 1983 inquiry under federal law is whether defendant Clayton County, under Georgia law, has control over the Sheriff in his law enforcement function . . .").

b. Was Judge Moxley a Final Policymaker for the Brevard County Sheriff's Department?

Judge Moxley was acting exclusively on behalf of the state judiciary, not the Brevard County Sheriff's department, when he issued his administrative order on April 21, 1997 and personally directed its enforcement on December 10, 1997. The position of Chief Judge of a circuit court is a creature of the Florida Constitution, which reposes in him or her, *inter alia*, the authority of administrative supervision over the circuit and county courts in a particular circuit. Fla. Const. Art. V, § 2(d); *McMillian*, 520 U.S. at 787 (beginning its analysis of the final policymaker issue by examining the Alabama state constitution). Judge Moxley was the Chief Judge of the 18th Judicial Circuit, which encompasses Seminole and Brevard counties, not Brevard county alone. Fla. Stat. Ann. 26021(18) (2003); *McMillian*, 520 U.S. at 789 (turning next to an examination of state statutory law). His jurisdiction, whether in his judicial or administrative capacities, was broader, and therefore distinct from, Brevard County or its Sheriff's department. *See generally* Fla. Stat. Ann. 43.26 (2003) (delineating the authority of a chief circuit judge). In addition, the April 21, 1997 administrative order applied generally to both Seminole and Brevard counties, and its promulgation flowed directly from Judge Moxley's constitutional and statutory authority as chief judge, which is a state judicial officer, not a county-level executive officer. Finally, Judge Moxley was at all times a salaried employee of the state, not the county

or its Sheriff's department. Fla. Stat. Ann. 26.51 (2003); *Grech*, 335 F.3d at 1335 (noting that state-mandated salary requirements suggest that a sheriff under Georgia law is a state, rather than county, official). Therefore, for the purpose of a *Monell* analysis, nowhere does Florida constitutional or statutory law, which entrusts chief judges with the authority to make administrative policy concerning courthouses, state or even imply that his authority is exercised on behalf of the Brevard County Sheriff. On the contrary, the administrative and supervisory duties of the presiding judge of a judicial circuit such as the 18th are rooted unambiguously in his or her judicial authority granted by chapter 43 of Florida statutory law, which sets forth the general provisions of the state judiciary. One subsection of chapter 43 confers a particularly broad allowance of administrative authority, and Judge Moxley was presumably exercising powers granted to him by this subsection when he wrote his administrative order of April 21, 1997 and directed Deputy Reynolds to enforce it on December 10, 1997. Fla. State. Ann. 43.26(2)(f) (2003) ("To do everything necessary to promote the prompt and efficient administration of justice in the courts over which he or she presides.").

The Brevard County Sheriff had no authority to control Judge Moxley. The Brevard County Sheriff, like all sheriffs, has a statutory duty to execute orders of circuit and county judges.[5] Fla. Stat. Ann. 30.15(b) (2003). The Sheriff has no apparent discretion to decline to enforce judicial orders or to create final

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5. This statutory provision seems worded primarily to cover orders written by a judge in his or her judicial capacity. Nevertheless, absent clear statutory direction to the contrary, it is difficult to imagine that the Sheriff is not also required to execute lawful orders of the Chief Judge pertaining to his or her administrative authority.

administrative policy for courthouses within the 18th Judicial Circuit that is or are contrary to the orders of chief judge. Plaintiff points to no caselaw, and the Court could find none, in which state courts have held that a chief circuit judge is subject to the oversight of a county sheriff. *See Grech*, 335 F.3d at 1336-1338, 1347-1348 (engaging in a close examination of Georgia law to determine whether a county sheriff is under the control of the county government). Indeed, the Sheriff's corporate representative, Commander George Douglass, who is the Sheriff's Court Services Director, characterizes the obligation of Sheriff's deputies to obey judges as a "sworn duty." Doc. No. 132, Douglass Depo. p. 33. Thus, contrary to Plaintiff's contention that the Sheriff voluntarily shared authority with Judge Moxley,[6] the Sheriff and his deputies, especially with respect to administrative orders concerning the courthouses in the 18th Judicial Circuit, are the obedient servants of Judge Moxley and his judiciary. In other words, it is not that Judge Moxley had been subsumed by the Sheriff's department on either April 21 or December 10, 1997, but rather that Judge Moxley, in his capacity as Chief Judge of the 18th Judicial Circuit, subsumed Deputy Reynolds and other deputies whom the law put at his disposal.

It is the absence of any Brevard County Sheriff's authority in Judge Moxley's acts that distinguishes the facts of this case from *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), upon which the Court earlier relied and Plaintiff continues to rely. In *Pembaur*, deputies had been dispatched to a medical clinic to execute an arrest warrant upon employees who were thought to be involved in welfare fraud. When the deputies arrived in the waiting room,

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6. Doc. No. 135, pp. 2 & 4.

Dr. Pembaur locked the door that separated the reception area from the examination rooms, making it impossible for them to arrest the employees who had taken refuge somewhere inside the clinic.[7] The deputies consulted with their supervisor who told them to call the county prosecutor. The county prosecutor advised the deputies to enter the clinic forcibly, upon which the fourth amendment rights of Dr. Pembaur were violated. The issue before the Court was whether the county prosecutor had the proper legal authority to create the sort of final policy that exposed the county sheriff's department to liability. The sheriff in *Pembaur* argued that, while its deputies are legally beholden to the prosecutor, the prosecutor is not an employee of the sheriff and, therefore, not a policymaker.

The Supreme Court rejected this view, holding instead that Ohio law reposed limited policymaking authority in the county prosecutor in order for the sheriff to be able to respond expeditiously when he encounters novel circumstances as he did that afternoon in Dr. Pembaur's waiting room. The Supreme Court, in other words, ruled that state law invested authority in the county prosecutor on behalf of the county, for which the county sheriff was ultimately answerable. *Pembaur*, 475 U.S. at 484-485.

No reasonable construction of Florida constitutional or statutory law permits the conclusion, pace *Pembaur*, that Judge

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7. The events of *Pembaur* took place before the decision in *Steagald v. United States*, 451 U.S. 204 (1981), which held that police need a search warrant to enter the private property of a third-person when they want to execute an arrest warrant against someone who may be hiding on the third-person's property. The parties in *Pembaur* agreed that the *Steagald* doctrine applied retroactively.

Moxley acted with county authority in a way for which the Brevard County Sheriff is ultimately liable.[8] As already discussed, Judge Moxley was a state judicial official acting in accordance with his administrative jurisdiction over the entire 18th Judicial Circuit. As a state judge, even when acting in his administrative capacity, the Chief Judge has no direct, organic link to the Brevard County Sheriff. To the extent that the Chief Judge issues administrative orders concerning courthouse procedure and policy like the one Judge Moxley authored on April 21, 1997, the Sheriff, through his deputies, has a non-discretionary duty to obey. *Grech*, 335 F.3d at 1335 (finding no county liability for acts of the sheriff because Georgia state law establish that counties and their sheriffs are independent).

Pembaur is also distinguishable from the instant case in the sense that *Pembaur* examined the relationship between closely affiliated government entities: the county sheriff and the county prosecutor. Here, however, the issue concerns the relationship between government entities that are not simply unaffiliated, but belong to independent branches of Florida's constitutional

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8. There is no reported case found in Florida in which the administrative acts of a chief judge were held to be unconstitutional, much less a case in which not only were the administrative acts of a chief judge held to be unconstitutional, but a county sheriff's department was held liable for the tortious misconduct in question. The only remotely similar case involved an administrative order of a chief judge, coincidentally Judge Moxley himself, being quashed because it intruded upon the authority the law invests in the Clerk of the Court. *Morse v. Moxley*, 691 So. 2d 504 (Fla. Ct. App. 5th 1997). That case has no applicability because in the instant case there is no indication that Judge Moxley acted outside the proper scope of his administrative authority.

government. Fla. Const. Art. II, § 5 ("The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). Therefore, absent unmistakable instruction from the Florida Supreme Court, this Court can discern no basis for concluding that Florida law intended the Sheriff of Brevard County to be liable for the policies devised and implemented by a member of the judicial branch over whom the Sheriff had not one iota of control and had a statutory obligation to obey.[9]

Having concluded that Judge Moxley's administrative order of April 21, 1997 and his verbal order of December 10, 1997, which resulted in Deputy Reynolds' acts, were not the actions of the Brevard County Sheriff's department, the Court accordingly rules that the Brevard County Sheriff cannot be held liable in his official capacity for Deputy Reynolds' conduct on December 10, 1997. Defendant's motion for summary judgement is accordingly granted.

2. Plaintiff's Motion for Partial Summary Judgement (Doc. No. 133)

The entry of summary judgment for Defendant renders moot Plaintiff's motion for partial summary judgment.

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9. This naturally raises the question of who the proper defendant is under the facts of this case. However, the Court does not need to reach this issue to resolve the questions before it and as such expresses no opinion.

Appendix B

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment (Doc. No. 129) is **GRANTED**. Judgment shall be entered in favor of Defendant and against Plaintiff. Plaintiff shall take nothing.

Plaintiff's motion for partial summary judgment (Doc. No. 133) is **DENIED**.

Any argument or issue not specifically addressed herein shall be considered moot.

The Clerk is directed to close this case.

DONE and **ORDERED** in Chambers in Orlando, Florida this 8th day of March, 2004.

s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED NOVEMBER 7, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:00-CV-1601-ORL-19JGG

GLENN WILLIAM PINFIELD,

Plaintiff,

v.

BREVARD COUNTY SHERIFF, PHIL WILLIAMS,

Defendant.

ORDER

This cause is before the Court on the following matters:

1. Plaintiff's Dispositive Motion for Partial Summary Judgment. Doc. No. 41.

2. Plaintiff s Memorandum of Law in Support of His Motion for Partial Summary Judgment. Doc. No. 42.

3. Sheriff's Response to Plaintiff's Motion for Summary Judgment. Doc. No. 75.

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4. Sheriff Williams' Motion for Summary Judgment. Doc. No. 51.

5. Plaintiff's Response to Defendant's Motion for Summary Judgment. Doc. No. 69.

6. Plaintiff's Supplemental Brief in Response to Defendant's Motion for Summary Judgment. Doc. 102.

7. Sheriff Williams' Response to Plaintiff's Supplemental Brief in Response to His Motion for Summary Judgment. Doc. 106.

Plaintiff Glenn William Pinfield brought a twelve count complaint against Defendant Brevard County Sheriff Phil Williams in his official capacity for alleged violations of the former's constitutional and statutory rights. The parties have stipulated to a dismissal of Counts 8-12 of the verified complaint. Doc. No. 68. Both parties move for summary judgment on the remaining claims.

BACKGROUND:

Plaintiff's cause of action under §§ 1983 & 1985(2) arises out of his arrests by the Brevard County Sheriff's Deputy Roy Osborne and an encounter Plaintiff had with Sheriff's Deputy Craig Reynolds at the Titusville Courthouse, which, while not resulting in an arrest, nevertheless raises serious civil rights issues.

Appendix C

1. The First Arrest at the Moore Justice Center

The first of these arrests occurred on April 21, 1997, while the Plaintiff was distributing leaflets in front of the Moore Justice Center ("MJC") in Viera, Florida. The Plaintiff and approximately four friends were distributing leaflets to any passerby. The leaflets concerned the Fully Informed Jury Association ("FIJA") and its advocacy of jury nullification. Doc. 29, Exh. 4. In FIJA's view, a jury is not required simply to apply the law according to the judge's instructions. The jury is, in addition, entitled to nullify unjust or immoral laws, or, alternatively, register its disapproval of governmental misconduct. The jury exercises this purported right of nullification by finding a criminal defendant "not guilty" even if the jury concludes that the defendant-is, in fact, technically guilty under the law. FIJA claims that jury nullification is a legitimate and well-established practice that is consistent with the highest traditions of American justice.

In addition to the information on jury nullification, some of the leaflets described the case of Larry Reid, a friend of the Plaintiff, who claimed to have been beaten up by a Sheriff's deputy during an arrest. These same leaflets also criticized several Brevard County officials, including judges, and alleged a pattern of serious official malfeasance. *Id.* On the day in question, April 21, 1997, Mr. Reid was at the MJC for a hearing, although he was not before a jury and the record provides no reason to suspect that Mr. Pinfield's FIJA advocacy on that particular day was secretly intended to influence the outcome of Mr. Reid's case.

Appendix C

The Plaintiff and his friends were distributing their leaflets on the sidewalk in front of the MJC's main entrance. The Plaintiff estimates that they were about ten to fifteen yards from the entrance. Doc. 29, p. 40. Sheriff's Deputy Roy Osborne remembers it as about 15 feet from the door and about eight feet from the *cul-de-sac* in front of the MJC. Doc. 57, p.10.

The MJC does not abut the main street, and the sidewalk the Plaintiff and his associates used is entirely on MJC grounds. According to the blueprints, the courthouse is set back substantially from the public street and flanked on either side and to the front by courthouse parking lots. Doc. 44, Exh. 3. The parking lots are bisected by a service road that leads from the public street to the front of the courthouse, culminating in the *cul-de-sac.* The sidewalk that the Plaintiff used runs alongside this service road and enables people to walk from the public sidewalk on the public street to the courthouse or from the courthouse parking lots to the courthouse. It does not appear that these sidewalks on the MJC grounds have any purpose apart from their connection to courthouse business.

According to the testimony of Deputy Patricia Borsanyi, she was instructed by Deputy Robert Wagner to go outside and get information from the Plaintiff s group about what they were doing and why they were blocking the entrance. Doc. 60, p. 9. Deputy Borsanyi did this but met with what she characterized as "negative results." *Id.*

According to the testimony of Deputy Roy Osborne, he was sent outside by his supervisor, Sergeant Robert Barry,

to tell the Plaintiff's group that it was illegal to distribute FIJA literature because it had almost caused a mistrial. The Plaintiff similarly remembers Deputy Osborne justifying his order to stop leafletting on county property because FIJA material posed a mistrial threat. Doc. 29, p. 67. Deputy Osborne does not recall Sergeant Barry citing any administrative rule or law in support of his belief that FIJA leafletting is illegal. Doc. 57, p. 6-7. There is no evidence that Sergeant Barry acted on anything but his own initiative.

Deputy Osborne explained to the Plaintiff's group that they had to move off county property into the street if they wanted to continue to leaflet. By "street", Deputy Osborne meant the aforementioned *cul-de-sac* in front of the courthouse. Doc. 58, Exh. 3. He considered the *cul-de-sac* a permissible place to leaflet because he believed, probably erroneously, that it was not part of county property. Doc. 57, p. 14.

Everyone in the Plaintiff's group except the Plaintiff himself complied with Deputy Osborne's order. According to Deputy Osborne, the Plaintiff stated that he had a constitutional right to hand out literature. *Id.* at 18. After issuing his instructions to the Plaintiff s group, Deputy Osborne returned inside the MJC, from where he observed the Plaintiff continue to pass out leaflets from the sidewalk. The Plaintiff contends, on the other hand, that he tried to comply with the order but was forced to move back and forth between the street and sidewalk to avoid traffic. Doc. 29, p. 41. It is undisputed, in any case, that the Plaintiff did distribute more leaflets from the sidewalk, and it was at that time that Deputy Osborne came back outside and placed the Plaintiff under arrest for disorderly conduct. Doc. 57, p. 18; Doc. 51, Exh. C.

Appendix C

2. Judge Moxley's Administrative Order

Also on April 21, 1997, though it is unclear at what time of day, Judge John Moxley, the Chief Judge of the circuit, issued an administrative order that required people who want to distribute material on courthouse property to furnish copies to the Chief Judge in advance so "that the issues of the right to free speech, due process, and the right to a fair trial under the law may be adjudicated." Doc. 50, Exh. 1. Judge Moxley testified that the purpose of the order was to ensure that judges would be in a position to take precautionary or curative measures with their jurors in the event that they are exposed to FIJA literature, which Judge Moxley believes exerts a pernicious influence on jurors. Doc. 50, pp. 10 & 27. The order does not by its terms ban any particular point-of-view nor does it call for the wholesale confiscation of material that is in the midst of being distributed without having first gone through the review process. The order also does not specify exactly what this review process entails, how long it takes, and how far in advance activists need to submit their literature.

There is no evidence that Plaintiff Pinfield's arrest on April 21, 1997 was pursuant to this order.

3. The Second Arrest at the MJC

The Plaintiff's second arrest took place on September 22, 1997, again at the MJC, and is related to his first one.

On June 9, 1997, the State Attorney's Office filed an Information against the Plaintiff for a violation of Fla. Stat.

ch. 877.03 (disorderly conduct). After a series of recusals, the Plaintiff's case was assigned to Judge Adkins, who, on August 25, 1997, set a docket sounding for September 5, 1997. Though Judge Adkins' order noted that it was to be sent to the Plaintiff's attorneys, neither apparently received it until September 8, and as a consequence Plaintiff failed to appear. Doc. 70, Exh. 15. Because of this non-appearance, Judge Adkins issued a bench warrant for the Plaintiff's arrest.

Plaintiff and his counsel arrived at the MJC on September 22, 1997 for hearings concerning the Plaintiff's motion to disqualify Judge Adkins and to have the bench warrant lifted. As they passed through the lobby, the Plaintiff was arrested again by Deputy Roy Osborne, this time pursuant to the outstanding bench warrant. Other than Plaintiff's unsubstantiated conjecture, there is no evidence that Deputy Osborne's presence in the lobby was irregular or that he was assigned to the lobby specifically to intercept the Plaintiff. The Plaintiff was processed and taken to jail.

During the hearing, Judge Adkins issued an order that eliminated the $500 bond for the failure to appear warrant and released the Plaintiff on his own recognizance.

After a series of efforts to have Judge Adkins disqualified, the Plaintiff's case was ultimately assigned to Judge Cathleen Clarke, who, on October 18, 2000, granted the Plaintiff's motion to dismiss the criminal charge for disorderly conduct.

According to Plaintiff's testimony, following the April 21, 1997 arrest, he distributed FIJA material at the MJC nine, ten, or eleven times without incident. Doc. 53, p. 160.

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4. The Encounter at the Titusville Courthouse

The Plaintiff again distributed FIJA leaflets and other material such as the Constitution at the Titusville Courthouse on December 10, 1997. According to the Plaintiffs videotape of the incident, the Plaintiff and two friends stood on the sidewalk in front of the courthouse and again handed their literature to any passerby who cared to receive it. Doc. 44, videotape exhibit.

The layout of the Titusville Courthouse is different than that of the MJC. The Titusville Courthouse directly abuts a public sidewalk and ordinary city street. There is a small walkway, with a flagpole as its centerpiece, that leads from the public sidewalk to the courthouse doors. Only this walkway appears to be on courthouse property. According to the videotape, the Plaintiff remained on the public sidewalk in front of the courthouse while handing out his FIJA literature, and the only time his friend Mr. Reid was on courthouse property was when he was speaking with Deputy Reynolds or a man who stood on the steps to smoke.[1]

The videotape begins with Deputy Eberhart asking the Plaintiff and his friends what they were distributing and what it means. After reviewing the material, Deputy Eberhart went into the courthouse. Deputy Craig Reynolds came outside thereafter and told the Plaintiff that he could not give his

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1. The videotape depicts a man smoking on the steps of the courthouse who may have taken a copy of Mr. Ried's FIJA material while both men were on courthouse property. The majority of the leafletting, however, appears to have taken place on the public sidewalk.

literature to jurors. Plaintiff Pinfield insisted that he had a constitutional right to hand out his leaflets to anyone and continued to do so even as Deputy Reynolds carefully read some of the literature. Deputy Reynolds testified that he was trying to ascertain if the Plaintiff had some special permission to be there that would exempt him from Judge Moxley's administrative order. Doc. 76, p. 5. This encounter was reasonably congenial, and Deputy Reynolds asked the Plaintiff to remain on the public sidewalk while he went inside to speak with Judge Moxley.

Deputy Reynolds returned with a substantially different attitude. He informed Plaintiff Pinfield that his literature was subject to seizure and that the Plaintiff and his associates would be arrested if they remained. Deputy Reynolds thereupon confiscated Mr. Pinfield's leaflets and other things, apparently including a number of personal items that had nothing to do with FIJA advocacy, and chased Mr. Pinfield away. Deputy Reynolds and two fellow officers followed Mr. Pinfield into the parking lot across the public street from the courthouse to ensure that they vacated not only the immediate environs of the courthouse but the neighborhood altogether.

The videotape evidence establishes that (1) Deputy Reynolds was acting pursuant to Judge Moxley's administrative order; (2) after speaking with him, Deputy Reynolds was acting according to verbal instructions he had received from Judge Moxley; (3) both Deputy Reynolds and Judge Moxley believed that the administrative order contained the authority to regulate the public sidewalk in front of the Titusville Courthouse; and (4) Judge Moxley

ordered Deputy Reynolds, presumably pursuant to his own administrative order, to seize the Plaintiffs material.[2]

LEGAL STANDARD:

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment will be given only where "the evidence is such that a reasonable jury could [not] return a verdict for the non-moving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986).

ANALYSIS:

1. Introduction

There are two distinct dimensions to this case, each one of which implicates some of the most intricate and searching questions in constitutional law. The first of these is the threshold matter of whether the Sheriff's deputies acted pursuant to an official policy or a custom so pervasive as to be tantamount to policy. It is essential to answer this at the outset because a cornerstone of modern civil rights

2. Deputy Reynolds testified that while he does not specifically recall Judge Moxley ordering him to confiscate Plaintiff's material, he assumes from his conduct on the videotape that he received such a directive from the Judge. Doc. 76, p. 6.

jurisprudence is that local government entities like the Brevard County Sheriff's Department cannot be held responsible for the ordinary torts of their low level employees. It is not obvious in the instant case, however, who the policymakers are. Is Judge Moxley, for example, properly characterized under the law as a final policymaker for the Brevard County Sheriffs Department?

The second dimension of this case involves a collision between the First Amendment and the ability of a judiciary to conduct its proceedings fairly when its prospective jurors often arrive in court clutching a FIJA leaflet that advocates what might charitably be described as an unorthodox interpretation of a juror's duties under the law. The doctrinal complexity of this case intensifies the deeper one ventures into the record because it is by no means clear whether the courthouse sidewalks in question are public or non-public fora nor whether Judge Moxley's administrative order is content-neutral or content-specific.

2. Were the Deputies Acting Pursuant to an Official Policy

The purpose of § 1983 is to provide plaintiffs with a remedy for the profound, systematic, or continuous violation of their Constitutional rights. The statute is not a simple tort and will not support liability merely on a theory of *respondeat superior. See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). Instead, "liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible

for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The plaintiff must prove, in other words, that the violation occurred pursuant to an official policy or, alternatively, a custom so pervasive as to amount to policy. The analysis begins, therefore, with this threshold inquiry: did the deputies act pursuant to an official policy or custom of the Brevard County Sheriff's Department?

a. The April and September Arrests

The Plaintiff has adduced no evidence that there was an unconstitutional policy in place responsible for any alleged violation of his rights with respect to the April and September arrests. In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988), the Supreme Court reiterated the central holding in *Monell* that "[a local government] cannot be held liable under § 1983 unless [the plaintiff] proved the existence of an unconstitutional municipal policy." In *Praprotnik*, as in the instant case, "[the Plaintiff] does not contend that anyone in [county] government ever promulgated, or even articulated, such a policy." *Ibid.* The only formal policy that Plaintiff identifies is Judge Moxley's administrative order, which was written on the day Plaintiff was arrested. Whatever the constitutionality of this order (a question that will be examined below), it is irrelevant because the Plaintiff does not claim that he was arrested pursuant to its authority.[3]

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3. As mentioned previously, it is not even clear that Judge Moxley's order was in effect when the Plaintiff was arrested because there is no evidence concerning at what time of day on April 21, 1997 that Judge Moxley wrote the order.

Appendix C

In the absence of a formally enacted policy, the Plaintiff is left to allege that low level officials in the Sheriff's department, like Sergeant Barry and Deputy Osborne, created department policy on an *ad hoc* basis through the exercise of their discretion. This, however, places an onerous burden on the Plaintiff. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 405 (1997); *see also Canton v. Harris*, 489 U.S. 378, 391-92 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985).

Neither Deputy Osborne nor his supervisor Robert Barry possessed the authority necessary for their discretionary acts to be considered official Brevard County Sheriff's Department policy. In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), the Supreme Court set forth a test to determine whether an official has the authority to create *ad hoc* policy. First, only those officials who have final policymaking authority can by their actions expose the county to liability. Second, whether a particular official has this final policymaking authority is a question of state law.

Florida law explicitly defines a Sheriffs employee like Roy Osborne or Sergeant Barry as an official who is not entrusted with "managerial, confidential, or policymaking duties." *See* Fla. Stat. ch. 30.072. Yet, as stated a moment ago, to succeed in his § 1983 action, Plaintiff must show a reasonable likelihood that his arrest was pursuant to the

discretionary authority of someone who would be defined as a final policymaker under state law. He has not done this. The most senior person to whom the Plaintiff ascribes responsibility for his April 21 arrest is Sergeant Barry. Florida law, however, simply does not invest policymaking authority in these sorts of front-line officers. To impose liability on Brevard County for the isolated, discretionary actions of Sergeant Barry would effectively transform § 1983 into a vicarious liability statute, which the Supreme Court in *Monell* and its many progeny has repeatedly held it not to be.

It should be noted, in addition, that the Plaintiff's argument that nothing the Sheriff's deputies did was inconsistent with official policy and therefore equivalent to official policy is without merit. Doc. 42, pg. 4. As the Supreme Court in *Praprotnik* explains, "[s]imply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy." 485 U.S. at 130. The Court adds that "[abiding by the decisions of subordinates] is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them." *Ibid.* If the failure of the Brevard County Sheriff to micro-manage and approve every discretionary act by his employees subjected the department to liability, § 1983 would be indistinguishable from a garden-variety *respondeat superior* tort, which, again, *Monell* emphasized it is not. For liability to attach, the Plaintiff must prove that someone with policymaking authority enacted either a formal or *de facto* official policy, not urge this Court to infer that this occurred by pointing to the Sheriff's ostensibly tacit approval of its employees' actions.

This Court finds, therefore, that the Plaintiff has failed to show that either the April or September arrests were pursuant to any official policy of the Brevard County Sheriff's Department. Liability under § 1983 is accordingly precluded on that basis, and this Court grants partial summary judgment to the Defendant with respect to Counts 1, 2, 3, 4, 5, and 6 of the Plaintiff's complaint insofar as they concern the April and September arrests.

b. The December Encounter at the Titusville Courthouse

The videotape unambiguously shows that Deputy Reynolds and his colleagues seized Plaintiff Pinfield's material according to the authority of Judge Moxley's administrative order and under the specific direction of Judge Moxley himself. The salient, but by no means easy, question then is whether Judge Moxley is an official policymaker of the Brevard County Sheriff's Department for the purposes of § 1983. Again, *Praprotnik*, *supra*, and its progeny hold that this is principally a question of state law.

Before explicating the law, however, it is instructive to begin with a careful look at *Pembaur*, *supra*. Its facts closely resemble those of the instant case and provide a useful point of departure. In *Pembaur*, deputy sheriffs had been dispatched to a medical clinic to execute an arrest warrant upon employees who were thought to be involved in welfare fraud. When the deputies arrived in the waiting room, Dr. Pembaur locked the door that separated the reception area from the examination rooms, making it impossible for them to arrest the employees, who had taken refuge somewhere inside the

clinic.[4] The deputies consulted with their supervisor, who told them to call the county prosecutor. The county prosecutor advised the deputies to enter the clinic forcibly, upon which the Fourth Amendment rights of Dr. Pembaur were violated. The issue before the Court was whether the county prosecutor had the proper legal authority to create the sort of final policy that exposed the County Sheriff's Department to liability. As in the instant case, the Sheriff in *Pembaur* argued that, while its deputies are legally beholden to the prosecutor, the prosecutor is not an employee of the Sheriff and, therefore, not a policymaker. The Supreme Court rejected this view, holding instead that Ohio law reposed limited policymaking authority in the county prosecutor in order for the Sheriff to be able to respond expeditiously when he encounters novel circumstances as he did that afternoon in Dr. Pembaur's waiting room.

While *Pembaur* stands for the proposition that non-Sheriff's employees can, in certain situations, create final policy for a Sheriff's Department, it does not tell us whether a judge is analogous to a prosecutor in a § 1983 policymaker analysis. Prosecutors and counties, after all, belong to the same branch of government, while judges and counties do not. As in *Pembaur*, the question is properly one of state law.

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4. The events of *Pembaur* took place before the decision in *Steagald v. United States*, 451 U.S. 204 (1981), which held that police need a search warrant to enter the private property of a third-person when they want to execute an arrest warrant against someone who may be hiding on the third-person's property. The parties in *Pembaur* agreed that the *Steagald* doctrine applied retroactively.

Appendix C

Though the state constitution delineates distinct judicial and executive branches, this separation of powers is not absolute, and Florida law contemplates the occasional exercise of discretionary policymaking authority by judges over executive branch entities like the Sheriff's Department. Chief Judges expose these entities to liability only when they act in an administrative capacity on behalf of the local government rather than in their judicial capacity on behalf of the state. *Owens v. Fulton County*, 877 F.2d 947, 951-52 (11th Cir. 1989) (stating that "an official may simultaneously exercise county authority over some matters and state authority over others."); *see also Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). When a county judge acts in her judicial capacity, she exercises authority invested in her as a state official and cannot thereby be said to have established local government policy. *Bass v. Parkwood Hospital*, 180 F.3d 234, 244 (5th Cir. 1999). When a judge acts in her administrative capacity, however, it is proper to impute policymaking status to her because in this respect she more closely resembles a local government administrator than a judge. *Owens* at 951. For instance, when a judge sentences a criminal defendant to one year in prison, it does not become the official policy of the local government jurisdiction in which the judge sits that the defendant be imprisoned for one year. If that same judge, on the other hand, terminates an insubordinate clerk, she acts in her administrative capacity as a local government official. Assuming that the termination decision is not subject to review, it can properly be said under *Monell* that it is official local government policy that the clerk be terminated. The vexing question in the instant case is whether Judge Moxley acted in his judicial or administrative capacity when he issued his administrative order.

Appendix C

This Court concludes that Judge Moxley acted in an administrative rather than judicial capacity when he wrote his administrative order. As the locution itself suggests, Judge Moxley's "administrative order", emanates from his administrative authority as the Chief Judge, as enunciated in Fla. Stat. ch. 43.26(1) ("The presiding judge of each judicial circuit, who shall be a circuit judge, shall exercise ***administrative supervision*** over all the trial courts within the judicial circuit and over the judges and other officers of such courts.") (emphasis added). Even a perfunctory survey of this statutory provision reveals that the duties of the Chief Judge are administrative and that when a Chief Judge acts in his or her capacity as Chief, as Judge Moxley did in the instant case, those actions are inherently administrative. This conclusion is corroborated by the fact that an ordinary circuit judge is not empowered either under the state constitution or by statute to draft an administrative order of general applicability. *See e.g.* Florida State Constitution, Art. V, § 5. If, in other words, only the Chief Judge has the authority to write a general administrative order and an ordinary judge without the Chief Judge's special administrative duties would be disallowed from writing such an order, it follows logically that a Chief Judge's general administrative orders are not promulgated in his or her judicial capacity.

Quite apart from abstract questions of statutory construction, the concrete facts surrounding the administrative order confirm that Judge Moxley wrote it in an administrative rather than judicial capacity and wrote it as a final policymaker for the county. *See Berdin v. Duggan*, 701 F.2d 909, 914 (11th Cir. 1983) (stating that, while the issue of who a policymaker is remains largely a question of state law, courts should not be blind to the possibility that an official may exercise *de facto*

final policymaking authority even if his statutory authority is ambiguous). Significantly, the order does not pertain to any particular case or controversy before either Judge Moxley or any other judge. Instead, it purports to regulate the dissemination of literature on county property and sets forth an unreviewable policy that county employees like the Sheriff's deputies are obliged to follow. In this respect, from the perspective of citizens like Mr. Pinfield, the administrative order is indistinguishable from any other ordinary regulation of county property.

The fact that other county officials could have enacted a policy that is substantively identical to Judge Moxley's administrative order strongly implies that he wrote it in his administrative rather than judicial capacity. *See McMillian v. Johnson*, 88 F.3d 1573, 1579 (11th Cir. 1996) (interpreting the *Praprotnik* doctrine such that a county will not be held liable for the policymaking acts of an official like a Sheriff who has both state and county duties unless the county could have authorized one of its officials to do what the Sheriff did ostensibly in the county's name). The record shows that the MJC, for example, has a reasonable time, place, and manner policy, which the facility manager implements to ensure that any First Amendment activity that takes place there accommodates activists without disrupting court business. Doc. 46, pp. 8-11. There is nothing about Judge Moxley's order that could not theoretically be subsumed under the MJC's existing reasonable time, place, and manner policy. This is persuasive evidence that Judge Moxley was not acting in any special judicial capacity when he drafted his administrative order.

For the foregoing reasons, therefore, this Court finds that Judge Moxley was a final policymaker for the Brevard County Sheriff's Department when he acted in his administrative capacity as Chief Judge. This Court further finds that this administrative order of April 21, 1997 was the official policy of the Brevard County Sheriffs Department for the purposes of § 1983 when the Plaintiff had his encounter with Deputy Reynolds at the Titusville Courthouse and that Deputy Reynolds acted pursuant to this policy.

c. Was There a Custom that Amounted to Policy

In the absence of a formal or *ad hoc* policy that is attributable to a final policymaker, the Plaintiff will reach the substantive merits of his claims based on the April and September arrests only if he can prove that his Constitutional rights were violated pursuant to a custom. In *Adikes v. S.H Kress & Co.*, the Supreme Court held that an informal custom acquires the force of law only when it is pervasive, well settled, and permanent. 398 U.S. 144, 168 (1970). The Court found that "Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South." *Id.* at 167. What constitutes a custom for the purposes of § 1983, in other words, is a set of practices as entrenched and constitutionally repugnant as racism. Indeed, the Plaintiff must show that his arrest was pursuant to the "settled practices of state officials" who were enforcing their "private predilections" as "compulsory rules of behavior." *Id.* at 168.

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Not only does the Plaintiff fail to allege that there is a settled practice in Brevard County to abrogate citizens' rights generally, he fails to allege even a coherent pattern of misconduct with respect to himself. The Plaintiff predicates his cause of action on his two arrests, one in April for FIJA leafleting and one in September for his failure to appear.

Assuming *arguendo* that the Plaintiff's rights were violated when he was arrested, Plaintiff cites no law that stands for the proposition that, contrary to *Adikes*, an isolated incident can ever constitute a custom. Even if this court includes the Titusville encounter in December 1997, any reasonable inference of a pervasive custom is negated by the Plaintiff's admission that, following his first arrest in April, he handed out FIJA leaflets at the MJC as many as eleven separate times without consequence. Doc. 53, pp. 160-161. The Plaintiff simply has not furnished evidence that there is a custom in Brevard County, analogous to Deep South racism in scope and intensity, that has effectively eviscerated the constitutional rights of the Plaintiff and similarly situated people.[5]

This Court finds, therefore, that there was no unconstitutional custom in place in the Brevard County Sheriff's Department that constitutes the requisite official policy under § 1983. This Court grants summary judgment to the Defendant on Counts 1, 2, 3, 4, 5, & 6 to the extent that these claims are predicated on the existence of an unconstitutional custom.

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5. It is not clear, furthermore, that the Plaintiff could prevail on a custom allegation without proving a pattern of unconstitutional malfeasance that touches people in addition to the Plaintiff.

Appendix C

3. Does the Administrative Order Violate the First Amendment

There is no right more central to American liberty than the freedom of speech, and nothing is more inimical to this freedom than government policies that deliberately chill, burden, or censor ideas that high officials find distasteful or inconvenient. Indeed, the Constitution does its most vital work when it protects the outcast, the unpopular, the minority, or any other solitary voice.

This venerable principle, however, does not mean that speech is immune to every constraint. Our jurisprudence is equally clear that government may impose reasonable time, place, and manner restrictions on expression as long as they are viewpoint-neutral and no more restrictive than necessary to satisfy a significant state interest. This ensures that protected speech does not become cacophonous or a general nuisance.

a. Is the Sidewalk in Front of the Titusville Courthouse a Public Forum

These rigorous standards, however, apply only to speech within a public forum, either traditional or designated as such. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44-46 (1983) (elucidating the standards that determine whether a forum is public or non-public). Traditional public fora are venues like municipal parks or sidewalks, which, historically, have been places where citizens gather to publicize their views and level criticism,

often vociferous and unforgiving, against the government. *See Hague v. Committee for Industrial Organization*, 407 U.S. 496, 515 (1939) (stating that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Designated public fora are government properties that are not inherently public but which the state has set aside specifically for citizens to use when they want to exercise their First Amendment rights. A designated public forum is entitled to constitutional protection that is as robust as its traditional counterpart. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 802 (1985).

At the remote end of the spectrum, beyond even the limited public forum, is the non-public forum. While its definition is somewhat nebulous, a non-public forum is government property of a type that, unlike a city park, has not traditionally been a nexus of expressive activity. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-683 (1992). Non-public fora are exemplified by venues like military installations and airports. *Id.* When a property is non-public, the government can, at its discretion, impose restrictions on the exercise of speech, which are evaluated constitutionally under a lenient "reasonableness" standard. *See generally Cornelius*, *supra* at 800; *Perry*, *supra* at 46; *Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129-30 (1983); *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

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As the foregoing suggests, any inquiry into the constitutionality of a regulation begins with an analysis of what sort of forum the venue in question is. *Lee* at 678.

Generally, a public sidewalk outside a courthouse is a traditional public forum. In *United States v. Grace*, 461 U.S. 171 (1983), the Supreme Court examined the constitutionality of a statute that forbade displaying banners and distributing leaflets on the grounds of the United States Supreme Court, including the perimeter sidewalks that surround the building. The Court held that the portion of the statute that pertained to these sidewalks was unconstitutional because they are indistinguishable from any other sidewalks in Washington, D.C. *Id.* at 179. The perimeter sidewalks, in other words, are general public thoroughfares and have no special relationship to the Supreme Court or its business. The *Court* noted that there were no signs or fences that indicated to pedestrians or protesters that merely by setting foot upon the perimeter sidewalk one has entered a distinct governmental enclave in which the ordinary rules of free speech have been diluted. *Id.* at 180. The Court emphasized, furthermore, that government may not encroach on public fora that abut government property simply by declaring legislatively that those fora are no longer public. *Ibid.* This conclusion was rooted in a deep conviction that traditional public fora occupy a sacrosanct station that is beyond the reach of government to revise, reform, or alter.

A non-public sidewalk entirely within government property, on the other hand, is not a public forum. Whether a sidewalk is public or not does not depend on whether people are free to come and go as they please. *Greer v. Spock*, 424

U.S. at 836. The crucial doctrinal issue is whether the sidewalk has a distinctly public character. One facet of this inquiry explores the degree to which the forum in question has been used traditionally as a venue for expressive activity. Airport concourses, for example, were held not to be public fora largely on the ground that they are too modern, never having established themselves in the pantheon of historically protected places for speech. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. at 680-81.

A second facet of this question examines in careful detail the precise location of the sidewalk and the reasons why citizens use it. In *United States v. Kokinda*, 497 U.S. 720 (1990), political activists set up a table on the sidewalk in front of the post office to distribute literature and solicit donations. The activists were convicted of violating a federal regulation that forbade solicitation on postal premises. Unlike the sidewalk in *Grace*, which was a general thoroughfare that was continguous with the Supreme Court grounds, the sidewalk in *Kokinda* was situated entirely within Postal Service property and used only as a means of entering and leaving the building. The Supreme Court focused on this distinction. It reasoned that the hallmark of a traditional public forum, such as the sidewalk in *Grace*, was a broad generality — people coming and going and gathering for all sorts of reasons. *Id.* at 729-730. The traditional public forum is the tumultuous, chaotic liveliness of the Boston Common, for example, whose pathways are used by Bostonians for every reason one might imagine. The post office sidewalk in *Kokinda*, on the other hand, is not a general pedestrian byway but instead simply what patrons use to walk from the postal parking lot to the door of the building. In contradistinction

to the diversity of the Boston Common, in other words, the post office sidewalk has no existence apart from its role as a means of building ingress and egress. On the basis of this distinction, the Court held the post office sidewalk to be a non-public forum.

Each courthouse in the instant case exemplifies either a non-public or a public forum.[6]

The sidewalk at the Moore Justice Center is a non-public forum. The basic layout of the MJC is similar to that of the post office in *Kokinda*. The MJC is set back from the public streets, and the sidewalk upon which Mr. Pinfield was distributing his leaflets was built solely for people to use as they come and go from the building. No one who does not have business at the courthouse would have any reason to use the sidewalk because it leads either from the public sidewalks on the mainstreet to the courthouse or from the courthouse parking lot to the courthouse itself. Though Mr. Pinfield's intuitions that the MJC sidewalk is a public forum are plausible, the absence of any purpose for the courthouse sidewalk other than as a means of such building's ingress and egress renders it a non-public forum.

The Titusville Courthouse, however, is a different story. The front of the courthouse abuts a public sidewalk, and it was upon that public thoroughfare that Mr. Pinfield and his

6. This Court includes a forum analysis of the MJC only to illustrate why the Titusville Courthouse is a traditional public forum. All of the Plaintiff's claims with respect to the MJC have been foreclosed on the ground that nothing that occurred there was pursuant to an official policy or custom.

friends distributed their leaflets.[7] Doc. 44, videotape. In this respect, the circumstances of the Titusville encounter are analogous to the scenario in *Grace*, in which the public sidewalk adjacent to the Supreme Court building was held to be a public forum. Under *Grace* and its progeny, when Mr. Pinfield stood on the public sidewalk in front of the Titusville Courthouse and handed leaflets to passersby, he exercised one of the most sacred liberties in our constitutional tradition. He did nothing more than what other men and women of conscience have done since the inception of the Republic — he walked up and down a public sidewalk and shared his views with fellow Americans. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("Indeed, the speech in which [the Plaintiff] engaged — handing out leaflets in the advocacy of a politically controversial viewpoint — is the essence of First Amendment expression."). As the Supreme Court underscored in *Grace*, the close proximity of this traditional public forum to the courthouse does not entitle the government to abrogate Mr. Pinfield's rights simply because the effects of his advocacy spill over or otherwise impinge upon government business. Quite to the contrary, it is the great purpose of the First Amendment that political speech, even highly tendentious speech, echo in the halls of government and sound in the ears of high officials.

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7. The videotape shows that Mr. Pinfield and his friends confined their expressive activity almost wholly to the sidewalk in front of the courthouse and were careful to stay off courthouse property. The only exception was when one of Mr. Pinfield's friends, Larry Reid, stood on courthouse property while talking to Deputy Reynolds or others who had gathered on the steps to smoke.

This Court finds, therefore, that the sidewalk in front of the Titusville Courthouse is a traditional public forum.

b. Is the Administrative Order Content-Specific or Content-Neutral

Having determined that the sidewalk in front of the Titusville Courthouse is a traditional public forum, the next step in the constitutional analysis is to determine whether Judge Moxley's administrative order is a content-specific restriction on Mr. Pinfield's particular viewpoint or a reasonable time, place, and manner regulation that is content-neutral.[8] This is a crucial distinction because a content-specific restriction on political speech in a traditional public forum is presumptively unconstitutional and elicits meticulous scrutiny. *See generally Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). A reasonable time, place, and manner restriction, on the other hand, as long as it affects speech only incidentally and has a content-neutral motive, is subject to a much less demanding review. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1985); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

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8. Without ruling on the issue, this Court notes that it is unclear from any of the parties' memoranda why a judge would believe that he or she has the authority to impose reasonable time, place, and manner restrictions upon expressive activity that takes place on municipal sidewalks in front of the courthouse but not on courthouse property. The authority to promulgate these sorts of restrictions seems to belong entirely to the City of Titusville.

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The Defendant argues in his memorandum that the administrative order is content-neutral because (1) it requires that "all literature" (emphasis omitted) be reviewed, and (2) Mr. Pinfield's material was examined and ultimately seized without regard to its content. Doc. 106, p. 3 & p. 5. The evidence belies this. While the administrative order is facially content-neutral, Judge Moxley admitted with admirable candor in his deposition that he drafted the order specifically to frustrate the persistent efforts of FIJA activists.[9] Doc. 54: Moxley Depo. p. 8-9. He stated in addition that he considered the order to be "content-based"and he believes that a citizen like Mr. Pinfield "can't tell jurors not to do what they are obligated by their oath to do." *Id.* at p. 29 & 30. The Defendant offers neither citations to the record nor to caselaw in support of his conclusory statement that the "Order itself is content neutral as evidenced by the deposition testimony of Judge Moxley." Doc. 106, p. 10. Furthermore, nowhere in his memorandum does the Defendant adduce evidence that the order was enforced against any point-of-view other than that of FIJA activists.[10]

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9. The Defendant concedes this in his memorandum. Doc. 106, p. 3 ("... the order was issued in response to the arising problem of jury nullification ..."). This Court doubts that there was a problem with jury nullification *per se* in that juries were actually engaging in nullification, rather the Defendant must mean that judges did not like that FIJA literature apparently persuaded some jurors to believe that they had a right to deviate from the law. This is the way Judge Moxley himself characterized the problem. Doc. 54: Moxley Depo. p. 8.

10. To be sure, this fact is only circumstantial evidence that the administrative order is content-specific and not dispositive by any means. In *Madsen v. Yyomen's Health Ctr.*, 512 U.S. 753 (1994),

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Finally, no reasonable person could watch the videotape of the December 10, 1997 encounter and conclude that the content of Plaintiff Pinfield's speech was not a factor in Judge Moxley's decision to have Deputy Reynolds and his colleagues seize the literature and chase off the Plaintiff and his friends.[11] Doc 44, videotape.

The facial neutrality of a restriction on speech is not dispositive. The "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. at 791; *see also R.A.V. v. City of St. Paul.*, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility — or favoritism — towards the underlying idea expressed."). Restrictions on speech that are apparently content-neutral are to be considered content-specific if the underlying motivation for the restriction is inordinately

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the Supreme Court rejected the petitioner's argument that the Court should infer that a facially neutral city ordinance secretly targeted anti-abortion protesters because the ordinance had only ever been enforced against them. The Court pointed out that it was only anti-abortion protesters who engaged in the sort of disruptive conduct that the ordinance was designed to proscribe.

11. The Defendant's contention that the content of Plaintiff Pinfield's speech played no part in how he was treated verges on the preposterous in light of the videotape (Doc. 44), which shows Deputy Reynolds carefully reading the FIJA handout before retreating into the courthouse with a copy of the same.

concerned with a specific point-of-view. In *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), the Supreme Court examined the policy of a public utility commission not to allow inserts into its monthly billing statements that advocated what the commission believed were controversial ideas. The policy had been upheld in lower courts on the grounds that it was content-neutral and merely a reasonable restriction because it foreclosed broad topics rather than particular speakers or viewpoints. The Court rejected this rationale, declaring that a restriction is content-specific when its motivation is to purify public debate by suppressing or burdening ideas or whole sets of ideas. In *Consolidated Edison*, as in the instant case, the officials who wrote the policy plainly admitted that they intended their regulation to target specific ideas that they considered to be deleterious. This admission provided a sufficient basis for the Supreme Court to find that the commission's policy, regardless of its appearance, was a substantively content-specific restriction on speech. For the purposes of constitutional analysis, Judge Moxley's administrative order must, therefore, be construed as a content-specific restriction because it was motivated entirely by a desire to interfere with the propagation and dissemination of FIJA ideas.

A content-specific restriction on speech in a public forum warrants strict scrutiny and the burden falls entirely upon the government to demonstrate its constitutionality. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). A content-specific restriction will be sustained only if it is narrowly tailored and in the service of a

compelling state interest.[12] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (stating that "[w]hen a law burdens core political speech, we apply "exacting scrutiny", and we uphold the restriction only if it is narrowly

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12. As will become clear, it is not necessary to reach the question of whether the administrative order implicates a compelling government interest because it is insufficiently narrowly drawn to be constitutional. This Court feels obligated to observe nevertheless that it is not clear that there is a compelling state interest at stake.

The Defendant contends that the relevant state interest is "the fair administration of justice and protection of its proceedings." Doc. 106, p. 8. This statement is too general, however. The requirement that the government articulate its compelling interest would be meaningless if the government could vaguely invoke nothing more than some broad principle of administrative efficiency. The relevant question, which the Defendant never addresses, is: does the government have a compelling interest in restricting general political speech about jury nullification and the judiciary even if that speech does not rise to the level of jury tampering. This Court assumes that nothing Mr. Pinfield did constitutes jury tampering because he was never arrested and charged with violating that statute. It is to be presumed that Judge Moxley's administrative order was intended to reach speech that is too general to be characterized as jury tampering but nevertheless a source of irritation to judges.

The Defendant cites *Sefick v. Gardner*, 164 F.3d 370 (7th Cir. 1998), for the proposition that the state has a compelling interest in preserving the dignity of the judiciary, which may be impugned by the sort of critical literature that Mr. Pinfield was distributing. Not only does the Defendant disingenuously alter the quoted text in a way that gives it a meaning beyond what Judge Easterbrook intended, the case simply does not apply because *Sefrck* is about speech in a non-public forum.

tailored to serve an overriding state interest."). The administrative order on its face is neither precisely drawn nor concerned with a compelling state interest.

The administrative order is not narrowly tailored because it is not the least restrictive means to accomplish Judge Moxley's goal. 505 U.S. at 395 ("The existence of adequate content-neutral alternatives . . . undercuts significantly any defense of such [an order], casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law.") (citations omitted). If the purpose of the administrative order is simply to ensure that judges learn what information is being distributed to prospective jurors so that the judges can take curative measures if necessary, there are ways to serve this legitimate goal that impose no burdens whatsoever on the exercise of First Amendment rights.

A judge could, for example, simply instruct his or her jurors or venirespersons not to accept literature from sidewalk activists. This instruction could be highlighted in the notification that summons people to jury duty. A judge could also ask his or her deputies to keep an eye out for activists like Mr. Pinfield and, when they appear, get a copy of the literature for review so that the judge would be able to caution jurors appropriately. This enumeration of alternatives is merely illustrative, not exhaustive, and the law reposes in officials like Judge Moxley considerable discretion to craft courses of action that satisfy both the legitimate administrative needs of government and the strictures of the Constitution.

Judge Moxley, however, took a much less salutary approach. He wrote an order that imposes a blanket prior restraint on speech until he has had an opportunity to complete some unspecified process of review. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (stating that "[a]ny system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity."). Not only is this approach inherently burdensome and not the least restrictive, it poses a serious danger of chilling the legitimate speech of people with unpopular ideas like Mr. Pinfield who may be intimidated by the authority of a state judge.

This Court finds, therefore, that Judge Moxley's administrative order is unconstitutional under the First Amendment insofar as it purports to regulate speech in a traditional public forum like the sidewalk in front of the Titusville Courthouse.[13] This Court further finds that it was improper for Deputy Reynolds to confiscate the Plaintiff's literature and personal items.

4. Fourth Amendment Claim and the Titusville Encounter

The encounter at the Titusville Courthouse did not violate the Fourth Amendment prohibition on arbitrary and unreasonable seizure because no constitutionally cognizable "seizure" occurred. Though somewhat counter-intuitive, the

13. It is not necessary to reach the issue of whether the administrative order is constitutional insofar as it applies to non-public fora. The content-specific nature of the order, however, raises serious questions about its constitutionality in any context.

mere threat of arrest does not in and of itself implicate the Fourth Amendment because a seizure takes place only when "an officer restrains the freedom of a person to walk away . . ." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *California v. Hodari*, 499 U.S. 621, 625-26 (1991) (stating that a seizure does not occur until a person yields to the efforts of a law enforcement officer to restrain him or her); *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993). A seizure, in other words, requires an application of physical force, which, it is undisputed, did not occur in the instant case.[14]

This Court accordingly grants summary judgment for the Defendant with respect to Counts 3 and 4.

5. Equal Protection Claim and the Titusville Encounter

The Plaintiff was not denied the equal protection of the law. For the reasons set forth earlier in this order, the Plaintiff is not entitled to recover under § 1983 for the April and September arrests because none of the Sheriff's deputies were acting pursuant to an official policy or custom.[15]

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14. This conclusion should not be construed to mean that the threat of arrest was innocuous. It was part of the effort by Judge Moxley and the deputies at his disposal to enforce an unconstitutional administrative order. Any harm that the Plaintiff suffered as a consequence of this effort is properly subsumed under Counts 1 and 2 of his complaint.

15. Nor does the record show that the newspaper boxes on the grounds of the MJC were permitted to be there pursuant to an official

(Cont'd)

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Nor was the Plaintiff denied equal protection of the laws during the encounter at the Titusville Courthouse. Other than a conclusory statement, Plaintiff offers not an iota of argumentation or caselaw in support of his contention.[16] Doc. 41, p. 14. Given Plaintiff's anemic effort, this Court is obliged to do no more than state that there is no evidence that the Plaintiff was subject to the sort of arbitrary and differential treatment that implicates the Fourteenth Amendment's equal

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policy that by its terms forbade people like the Plaintiff from distributing his material. As noted earlier; the record indicates that the policy of the MJC was to allow activists to disseminate their messages. Plaintiff never knew this, presumably, because he never asked, believing erroneously that the First Amendment gives advocates the unfettered right to speak whenever, however, and to whomever they choose. To sustain an Equal Protection claim on the ground that newspapers were treated differentially, the Plaintiff would have to set forth not simply that newspapers were permitted at the MJC but not FIJA leaflets. He would have to show: (1) that the administrative order was in effect; (2) that newspapers with jury nullification articles were allowed to be sold on courthouse property; and (3) that FIJA literature was forbidden. His Equal Protection claim is further complicated by the fact that Plaintiff was allowed to distribute his literature much more often than not at this facility.

16. The question of whether the Plaintiff was treated differently than newspaper corporations does not apply to the Titusville encounter because there is no allegation that there were newspapers available in the public forum. Even if such evidence were in the record, the Plaintiff would have had to show at minimum that those newspapers contained viewpoints that were distinct from those of the Plaintiff, and that the administrative order was not enforced against them. The Plaintiff showed nothing approaching this specificity and rigor.

protection clause. *Thigpen v. Bibb County, Ga. Sheriff's Dept.*, 223 F.3d 1231, 1237 (11th Cir. 2000) (". . . to properly plead an equal protection claim, plaintiff need only allege that through state action similarly situated persons have been treated disparately."); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

This Court accordingly grants the Defendant's motion for summary judgment with respect to Counts 5 and 6 of the Plaintiff's complaint insofar as they pertain to the Titusville encounter.

6. Is There a Cognizable Conspiracy Claim Under 42 U.S.C. § 1985(2)?

The Plaintiff has adduced nothing more than speculative and conclusory evidence of a §1985(2) conspiracy.[17] As the Defendant observes in his memorandum, Plaintiff's conspiracy claim consists primarily of his conclusion that his occasional brushes with the law imply the existence of a sinister and maleficent plot to deprive him of the equal protection of the law.[18] While unclear on the exact architecture of this shadowy

17. In his complaint, Plaintiff alleges a conspiracy in violation of § 1985(2)(B). Doc. 1, Count 7, p. 10. It is not clear where this (B) comes from because the statute is not subdivided beyond (1), (2), and (3). This Court assumes that by (B) Plaintiff is referring to the second clause of § 1985(2) because it deals specifically with equal protection issues and the first clause pertains only to the interference with persons who are to testify or otherwise appear in court, a scenario that does not appear relevant to the instant case.

18. According to Plaintiffs memorandum (Doc. 69, p. 17.), the conspiracy consists of Judge Adkins, Prosecutor Doyle, and Deputy

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cabal, Plaintiff speculates that it might encompass not only various officials in the Brevard County Sheriffs Department but also judges and members of the State Attorney's office. Doc. 29, p. 177.

In any case, Plaintiff does not allege that the putative conspiracy targets him as a member of a protected class.[19] The Eleventh Circuit, however, has held that the equal protection clause of § 1985(2) is to be construed in the manner of § 1985(3), which requires an allegation of class-based animus as an element of the claim. *Chavis v. Clayton County Sch. Dist.*, 300 F.3d 1288, 1292 (11th Cir. 2002). Plaintiff has failed to supply this critical allegation.

§ 1985(3) is no more a general federal tort than § 1983. Nor is it the civil analogue of the federal conspiracy statute, 18 U.S.C. § 242. In a footnote in the landmark *Griffin v. Breckenridge*, the Supreme Court explains that the "motivation requirement introduced by the word 'equal' into the portion of § 1985(3) before us must not be confused with

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Roy Osborne. Even if these highly implausible allegations were true, it is not remotely clear how the Brevard County Sheriff's Department could ever be liable for the intentional torts of these three people.

The Plaintiff also testified that he believes the press is part of the conspiracy against him. Doc. 29, p. 135-36.

19. Plaintiff correctly points out that the Supreme Court has held that an allegation of discriminatory motive is not necessary for a cause of action under the first clause of § 1985(2) (Doc. 69, p. 17). The same cannot be said about the second clause, however.

the test of "specific intent to deprive a person of a federal right made definite by decision or other rule of law" articulated by the plurality opinion in *Screws v. U.S.*, 325 U.S. 91, 103 (1945)." 403 U.S. 88, 102. Instead, the Court held that a conspiracy cognizable under § 1985(3) requires as one of its elements that the alleged conspiracy be motivated by invidiously discriminatory animus, by which the Court means discrimination that is racial or otherwise class-based. *Id.* Nowhere in his brief in support of his motion for summary judgment does the Plaintiff adduce evidence that the conspiracy he alleges is grounded in enmity towards a racial or other class to which he belongs. Absent evidence of this, a § 1985(3), and by extension a § 1985(2) claim, simply is not viable.

This Court, therefore, grants summary judgment to the Defendant on the Plaintiff's Count 7 because nothing in the record substantiates the existence of the sort of invidious conspiracy that this civil rights statute was, designed to eradicate.

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CONCLUSION

For the foregoing reasons, this Court:

1. Grants partial summary judgment to the Defendant Sheriff Phil Williams on Counts 1 and 2 with respect to the arrests at the Moore Justice Center;

2. Grants summary judgment to the Defendant Sheriff Phil Williams on Counts 3, 4, 5, 6, and 7 in their entirety;

3. Grants partial summary judgment to the Plaintiff Glenn William Pinfield on Counts 1 and 2 with respect to the encounter at the Titusville Courthouse.

This case will be heard before a jury concerning Plaintiff's claims of damages for the violation of his rights under the First Amendment but only insofar as they are attributable to the encounter at the Titusville Courthouse in accordance with this order.

DONE AND ORDERED at Orlando, Florida, this 7th day of November, 2002.

s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED JULY 1, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:00-cv-1601-Orl-19JGG

GLENN WILLIAM PINFIELD,

Plaintiff,

-vs-

PHIL WILLIAMS, Brevard County Sheriff,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: MOTION FOR LEAVE TO AMEND COMPLAINT (Doc. No. 66)

FILED: May 23, 2002

THEREON it is **ORDERED** that the motion is **DENIED**. The last day to amend pleadings was April 15, 2001. Plaintiff did not file a motion to extend that

date. Plaintiff now argues that he could not timely amend his complaint because Florida Statute § 768.28 requires that a claimant wait six months after providing notice to the Department of Insurance before filing a state law claim against a Florida sheriff. Plaintiff states that the six month waiting period ended on June 1, 2001. Plaintiff does not give any explanation as to why he did not file his motion to amend his complaint in order to add a state law claim until almost one year following the expiration of the waiting period.

DONE and **ORDERED** in Orlando, Florida this 1st day of July, 2002.

s/ James G. Glazebrook
JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 6, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-11498-JJ

GLENN WILLIAM PINFIELD,

Plaintiff-Appellant,

versus

PHIL WILLIAMS, Brevard County Sheriff,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

Before: BARKETT, MARCUS and SUHRHEINRICH*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

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* Honorable Richard Fred Suhrheinrich, United States Circuit Judge for the Sixth Circuit, sitting by designation

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Rosen Barkett
UNITED STATES CIRCUIT JUDGE

APPENDIX F — CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Seventh Amendment of the Constitution of the United States states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

877.03. Breach of the peace; disorderly conduct

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of

persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

43.26. Presiding judge of circuit; selection; powers

(1) The presiding judge of each judicial circuit, who shall be a circuit judge, shall exercise administrative supervision over all the trial courts within the judicial circuit and over the judges and other officers of such courts.

(2) The presiding judge of the circuit shall have the power:

(a) To assign judges to the trial of civil or criminal cases, to preliminary hearings, or to divisions and to determine the length of the assignment;

(b) To assign clerks and bailiffs;

(c) To regulate use of courtrooms;

(d) To supervise dockets and calendars;

(e) To require attendance of prosecutors and public defenders; and

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(f) To do everything necessary to promote the prompt and efficient administration of justice in the courts over which he or she presides.

(3) The presiding judge shall be responsible to the Chief Justice of the Supreme Court for such information as may be required by the Chief Justice, including, but not limited to, caseload, status of dockets, and disposition of cases in the courts over which he or she presides.

(4) The presiding judge of the circuit shall be selected by a majority of the judges subject to this section in that circuit for a term of 2 years. The presiding judge may succeed himself or herself for successive terms.

(5) Failure of any judge, clerk, prosecutor, public defender, or other officer of the court to comply with an order or directive of the presiding judge under this section shall constitute neglect of duty for which such officer may be suspended from office as provided by law.

(6) There may be an executive assistant to the presiding judge who shall perform such duties as the presiding judge may direct.

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768.28. **Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs**

(6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing ....

(b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

* * *

(d) . . . The failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section.

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IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BREVARD COUNTY

ADMINISTRATIVE ORDER NO: 97-9B

IN RE: DETERMINATION BY THE CHIEF JUDGE OF THE CIRCUIT REGARDING ISSUES OF THE RIGHT TO FREE SPEECH, DUE PROCESS, AND THE RIGHT TO A FAIR TRIAL AS IT PERTAINS TO THE DISSEMINATION OF PAMPHLETS, FLYERS OR HANDOUTS TO JURORS OR VENIREPERSONS ON COUNTY COURTHOUSE PROPERTY.

WHEREAS there are instances where individuals and organizations wish to deliver pamphlets, flyers or handouts to jurors or venirepersons who may sit as jurors, prior to sitting as jurors in any given trial. It is thereupon,

ORDERED

That before any party seeks to pass out literature, pamphlets, flyers or handouts to jurors or venirepersons, because they are jurors, on property comprising a courthouse in this county, the Chief Judge of this circuit must be presented such literature, pamphlets, flyers or handouts before they are distributed so that the issues of the right to free speech, due process, and the right to a fair trial under the law may be adjudicated.

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This order will take effect immediately.

DONE AND ORDERED this 21st day of April, 1997.

s/ John Dean Moxley, Jr.
JOHN DEAN MOXLEY, JR.
CHIEF JUDGE